

6
No. 2335

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho,
Central Division.

FILED

DEC 4 - 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

FORNEY & MOORE, Moscow, Idaho,

WILSON & NEAL, Portland, Oregon,

Attorneys for Plaintiffs in Error.

C. J. ORLAND, Moscow, Idaho,

J. T. BROWN, Colfax, Washington,

Attorneys for Defendant in Error.

*In the Circuit Court of the United States, District of
Idaho, Northern Division.*

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs,

vs.

THOS. S. POINDEXTER,

Defendant.

Complaint.

Now come the plaintiffs and for cause of action
against the defendant allege:

I.

That during all the times and dates herein mentioned A. C. Ruby was and now is doing business under the firm name and style of The A. C. Ruby Co., with his principal office and place of business in the City of Portland, Oregon. That said A. C. Ruby is now, and has been during all the times and dates herein mentioned, a resident and a citizen of the State of Oregon.

II.

That the plaintiffs, J. M. Leiter and Floyd J. Campbell, are citizens and residents of the State of

Oregon and have been during all the times and dates herein mentioned and are entitled to maintain this action.

III.

That the defendant above named is a resident and citizen of the State of Idaho.

IV.

That on the 14th day of February, 1911, the defendant, Thos. S. Poindexter, and one Henry Stroh, for a valuable [1*] consideration, made, executed and delivered to The A. C. Ruby Co. their certain promissory note, bearing date on that day, in words and figures substantially as follows, to wit:

“STOCKHOLDER’S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said Stallion of The A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows:

One Thousand and 00/100 Dollars.....

.....Oct. 1st, 1911

*Page-number appearing at foot of page of original certified Record.

Nine hundred and 00/100 Dollars.....

.....Oct. 1st, 1912

Nine hundred and 00/100 Dollars.....

.....Oct. 1st, 1913

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER.

HENRY STROH."

Which said note contains the following indorsements on the back:

"The A. C. RUBY CO.,

A. C. R.

A. C. RUBY,

Received payment as follows:

2/17-1911. Paid by Thos. S. Poindexter...\$400.00 one-third to be applied on each of the three payments."

V.

That the interest due on said note on August 14, 1911, has not been paid, nor any part thereof, although the same has been duly demanded, and that the defendant, Thos. S. Poindexter, and the said Henry Stroh, have refused payment thereof. That the said note provides that if the interest is not paid when due, the entire note shall become due and payable at the option of the holder thereof. That the plaintiffs have exercised their rights under said option, provided for in the terms of the said [2] note, demanded payment from the defendant, Thos.

S. Poindexter, and from said Henry Stroh, of the whole sum, both principal and interest.

VI.

That said Henry Stroh is a resident and citizen of the State of Washington.

VII.

That said note has not been paid nor any part thereof, except the sum of \$400.00 paid by the defendant, Thos. S. Poindexter, to apply, one-third on each installment of principal provided for in said note.

VIII.

That prior to the 14th day of August, 1911, The A. C. Ruby Co., aforementioned, for a valuable consideration, sold, assigned and transferred by endorsement, the said note to J. M. Leiter and Floyd J. Campbell, plaintiffs herein, and that the said plaintiffs are now the legal owners and holders of the said note.

IX.

That it is provided, in said note, that in case suit or action is instituted to collect same or any portion thereof, that the makers thereof agree to pay a reasonable sum as attorneys' fees in said suit or action. That the sum of \$350.00 is a reasonable sum to be allowed plaintiffs as attorneys' fees herein. That the amount involved in this controversy exclusive of interest and costs is more than \$2000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants for the sum of \$2400.00, with interest thereon from February 14, 1911, at eight per cent per annum until paid, and for the sum of

\$350.00 attorneys' fees herein and for the costs and disbursements in this action.

FORNEY & MOORE and
WILSON & NEAL,
Attorneys for Plaintiffs. [3]

State of Oregon,
County of Multnomah,—ss.

I, Floyd J. Campbell, being first duly sworn, say:
That I am one of the plaintiffs in the above-entitled
action and that the foregoing complaint is true as I
verily believe.

FLOYD J. CAMPBELL.

Subscribed and sworn to before me this 14th day
of December, 1911.

[Notary Seal] O. A. NEAL,
Notary Public for Oregon.

[Endorsed]: Filed December 16, 1911. A. L.
Richardson, Clerk. By M. W. Griffith, Deputy. [4]

*In the District Court of the United States, District of
Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Demurrer.

Comes now the said defendant in the above-en-
titled action and demurs to the plaintiffs' complaint
and for cause of demurrer alleges:

That the complaint of the said plaintiffs does not state facts sufficient to constitute a cause of action against said defendant.

C. J. ORLAND,

Attorney for said Defendant, Residing at Moscow, Idaho.

[Endorsed]: Filed Jan. 12, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [5]

Order Allowing Defendant to Withdraw Demurrer.

At a stated term of the District Court of the United States for the District of Idaho, held at Moscow, Idaho, on Monday, the 13 day of May, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 525.

J. M. LEITER et al.

vs.

THOS. S. POINDEXTER.

Now came the parties by the respective attorneys and thereupon, by leave of Court, the defendant withdrew the demurrer heretofore filed to the complaint herein and is given fifteen days from this date to file and serve his Answer in said cause. [6]

*In the District Court of the United States, District of
Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Answer.

Comes now the said defendant and answering the complaint of the plaintiffs, denies and alleges, as follows:

I. Answering paragraph numbered IV of plaintiffs' complaint,—

Deny that on the 14th day of February, 1911, or at any other time or date, that the said defendant, with one Henry Stroh or with any other person or otherwise, for a valuable consideration or any consideration, or by himself, or at all made or executed, or delivered to the A. C. Ruby Co. or to any person or persons for the said A. C. Ruby Co., his or their or either of their certain promissory note, or any promissory note, or any note whatever, to the said A. C. Ruby Co. Deny that the said defendant made or executed or delivered to the said A. C. Ruby Co. his promissory note or any *promissory* on the 14th day of February, 1911, or at other time or date or otherwise or at all.

Deny that said defendant made or executed or delivered to A. C. Ruby Co. or any other person or persons, any promissory note, or note or instrument in words or figures, as set forth in plaintiffs' com-

plaint, or in substantially such words or figures, or in any such words or figures, and deny that the said defendant ever at any time made or executed, or signed or delivered to A. C. Ruby Co. or to any person or persons for A. C. Ruby Co. a note or any note, of which a purported copy thereof is set out in plaintiffs' complaint, [7] or any other promissory note or any note whatever.

Deny that said purported note or any note, made or executed or delivered to A. C. Ruby Co. has indorsed thereon, as paid by Thos. S. Poindexter \$400.00, or any other sum; Deny that said defendant paid \$400.00, or any other sum of money whatever on said note or any note, to A. C. Ruby Co.

II. Answering paragraph numbered V, of plaintiffs' complaint,—

Deny that the interest or any interest is due on said note or any note, or on the 14th day of August, 1911, or at any other time.

Admit that the said defendant has refused to pay any interest on said purported note.

Deny that said defendant has at any time, made or executed or delivered said note or any note to the said A. C. Ruby Co. or that said note or any note provides that if the interest is not paid when due, the entire note or any note shall become due or payable at the option of the holder or any holder thereof.

Admit that plaintiffs, or one of them, has demanded payment of said note of and from said defendant, which he refused, for the reason that he never, at any time made, or executed or delivered said note or any note to A. C. Ruby Co. or any other

person or persons, to or for A. C. Ruby Co. or any other person, firm or corporation.

III. Answering paragraph numbered VII of plaintiffs' complaint,—

Deny that said defendant has paid on said note or any note to A. C. Ruby Co. the sum of four hundred dollars, or any other sum of money, or any other number of dollars, whatever, or that said sum of money or any sum of money was to apply, one-third or any other amount on each or any installment or principal, provided for in said note or any note, or otherwise.

IV. Answering paragraph numbered VIII, of the plaintiffs' complaint, the said defendant alleges, that he has no information or belief, upon the matters therein alleged, sufficient to enable him to answer the allegations therein set forth, and placing his denials [8] upon that ground, deny that prior to the 14th day of August, 1911, or at any other time, the said A. C. Ruby, for a valuable consideration or any consideration, sold, or assigned or transferred, by endorsement or otherwise, the said note or any note to J. M. Leiter or Floyd J. Campbell, or either of them, the plaintiffs herein, and deny that the said plaintiffs or either of them are now, or were at the time of the commencement of this action, or ever have been the legal owners or holders of the said note, or any note made or executed by the said defendant, or to which his name is signed.

V. Answering paragraph numbered IX of plaintiffs' complaint,—

Deny that the sum of three hundred and fifty dol-

lars is a reasonable attorney's fee to be allowed, in this action by the Court or that any other sum of money or amount is a reasonable attorneys' fee in this action.

VI. Deny that said defendant is indebted to the said plaintiffs upon said pretended promissory note, or any promissory note, in any sum whatsoever or at all.

For a further and separate defense, the said defendant alleges:

I. That on or about the 8th day of February, 1911, the said defendant was consulted and interviewed by one Watson, an agent of the said A. C. Ruby Co. mentioned in plaintiffs' complaint, as the person or firm to whom said purported note was executed as payee, to sell the said defendant an interest in a stallion which he then had or claimed to have in his possession, which said defendant declined, the said agent of the said A. C. Ruby Co. informed the said defendant that they would sell said stallion in shares of four hundred dollars each, for the sum of two thousand eight hundred dollars and offered, and promised the said defendant, that if he would assist in the sale of the said stallion, which as defendant is informed and believes is named Ithos and numbered 53,347, that he the said agent would give him as compensation for such services, in the event of making a sale of said stallion, one share in said stallion, which [9] he valued at four hundred dollars.

II. That at the time of said offer and interview, the said agent of A. C. Ruby Co., and at various other and divers times, during the transaction herein de-

tailed, represented to the said defendant that said stallion was sound and all right in every respect, that he was a good horse, with no defects, and would make and was a good breeder, and would make a good horse, with which to improve the stock in the vicinity, and that he was a valuable horse, and represented said stallion as being desirable for the purpose of breeding, and the said defendant relying upon said representations of the said agent of said A. C. Ruby Co., as to the quality of said stallion, and that he was in all respects as represented by said agent, and that said stallion was fit for the purposes of breeding, and was sound and desirable for breeding purposes, and was a valuable horse, entered into negotiations with the said agent of A. C. Ruby Co. with a view and purpose of assisting in such sale, and relying upon the representations of said agent of A. C. Ruby Co. as to the quality of said horse, and believing that said representations were true and correct, and that the horse was in all respects as represented, by said agent.

III. That the said defendant did nothing in said premises, further than said negotiations, that he did not attempt to sell said horse or any interest therein, and did not attempt to procure a purchaser for said stallion or any interest thereon, or do anything, in connection therewith, other than such negotiations as herein set forth and that a short time after such negotiations, the said agent aforesaid of A. C. Ruby Co. notified and informed the said defendant that he had sold said stallion to one Henry Stroh, except one share which had been reserved from said sale, and

that he the said defendant should have said share in said stallion, according to the offer that he the said agent had made to the said defendant, to assist him in selling said stallion. [10]

IV. That thereafter, the said Watson, agent of A. C. Ruby Co., as aforesaid, presented to the said defendant, a paper and requested him to sign the same, which he informed the said defendant was required, by A. C. Ruby Co. to be obtained from purchasers, showing who became the purchaser of the horse, and authorizing the delivery of the horse to some owner of an interest purchasing said horse, that it was necessary for him to obtain such authority prior to the delivery of said horse, as the same was required by the said A. C. Ruby Co. and that said instrument was in words and figures as follows, to wit:

“STOCKHOLDER’S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby we hereby authorize the delivery of said horse to any one of the subscribers hereto.

Portland, Oregon.

For value received, I promise to pay to the order of — payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows: — with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum

of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay a reasonable attorneys' fees.

That there was no indorsement upon said instrument, at the time it was shown to the said defendant, and no other paper, document or instrument than as above set forth, as nearly as defendant is able to give it, was ever presented to him in connection with said transaction; that he did not buy any interest in said stallion, and did not in any manner become indebted to A. C. Ruby Co., on account of said stallion, or in any other matter whatever.

V. That if the said instrument set out in plaintiffs' complaint in paragraph IV thereof, be in accordance with the original, of which it is claimed and alleged to be a copy, and the defendant's signature [11] be attached thereto, then the said defendant alleges, that said instrument has been altered and changed, as he at no time ever made, executed, signed or delivered any such instrument to A. C. Ruby Co. or to any other person or persons, that he never signed any instrument whereby he agreed to pay to A. C. Ruby Co. twenty-eight hundred dollars, and that he signed no instrument wherein he promised to pay one thousand dollars on the first day of October, 1911, and there was no promise to pay nine hundred dollars on the first day of October, 1912, and there was no promise to pay nine hundred dollars on the first day of October, 1913, and there was no promise to pay any sum of money at any time or date, and that as to all of said matters the said instrument has

been altered and changed, and that the said defendant never at any time made, executed or signed such instrument and never agreed to make, execute or sign such instrument, or any instrument for the payment of money in any amount to A. C. Ruby Co.

For a further and separate defense the said defendant alleges:

I. That the said stallion Ithos No. 53,347, as the said plaintiff has the said stallion numbered in his complaint, was represented by the A. C. Ruby Co. by and through his or their said agent Watson, to be sound, fit and desirable for breeding purpose, that he was suitable for breeding purposes for the purpose of improving horse stock, and that he was, in all respects fit, suitable and desirable for the purposes of breeding.

II. That said stallion Ithos No. 53,347 was not sound, in that he was wind-broken and could be moved but a few rods at a time, on account being so wind-broken, that he could not travel or be moved by his own physical strength, but a few rods at a time, and could not be moved from farm to farm, in the country, or from one city or village to another by his own physical strength, on account of such wind-broken condition, and that by reason and on account of said stallion being wind-broken, he was diseased, defective and unsound.

III. That said stallion was not fit or desirable to be used for breeding purposes, on account of his said unsound, diseased and defective [12] condition; that said stallion was worthless for the purpose of breeding or improving horse stock, and was not suit-

able to be used for that purpose on account of his diseased condition, and was useless and worthless for breeding or any other purpose whatever.

That said stallion was not such an animal as anyone would use for the purpose of improving horse stock, on account of his unsound and diseased condition.

IV. That the said A. C. Ruby Co., through their said agent, wilfully, falsely and fraudulently made the said representations to the said defendant, that the said stallion was sound, fit and suitable for breeding purposes, for the purpose of inducing said defendant to buy or take an interest in the said stallion, and to induce the said defendant to assist in the sale of said stallion, and that the A. C. Ruby Co. and the said agent knew that such representations and statements were false, and that they knew that said stallion was wind-broken, diseased and worthless for breeding purposes or any other purpose.

V. That whatever the said defendant did or assented to doing with reference to the sale of said stallion was done, by him, in full reliance upon the statements and representations, made to him by the said Watson, as the agent and as the representative of A. C. Ruby Co. in selling and disposing of said stallion.

That the said A. C. Ruby Co. and the said Watson knew that the said defendant relied upon the statements and representations so made to him, in all matters pertaining to said stallion, and that said defendant trusted and relied upon said statements and representations as to the condition and fitness of said

stallion for the purposes of breeding and improving stock, and as to all other matters pertaining to said stallion as herein alleged.

VI. That one Henry Stroh, whose name appears upon said instrument as set forth in plaintiffs' complaint, was, as said defendant is informed and believes, the purchaser of said stallion, and that as soon as it was discovered, or within a short time thereafter, that [13] the said stallion Ithos was diseased, he notified the said A. C. Ruby Co. thereof, and offered to return said stallion to him or them, and did ship said stallion to Portland, Oregon, where the said A. C. Ruby resides and where A. C. Ruby Co., is located, and tendered and offered to return to A. C. Ruby Co. the said stallion, which A. C. Ruby Co. refused, and refused to receive said stallion, although he had been shipped to Portland, and was there to deliver to said A. C. Ruby Co. without cost.

VII. That on or about February 14th, 1911, and after the said A. C. Ruby Co. had sold to Henry Stroh, the said stallion, the said agent of the said A. C. Ruby Co. notified the said defendant that he had sold said stallion to said Henry Stroh, but that in pursuance of a conversation had between said agent and the defendant, that he, the said agent, had reserved one share in said stallion, which he would give him, as he had before that time offered to do, if the defendant assisted in the sale of said stallion, and that he should have the said share in said stallion, although the said defendant had not assisted in said sale to Stroh, the same as though he had rendered such assistance, and requested the said defendant to

sign with Henry Stroh a certain guaranty or contract, with reference to the said stallion, and the said defendant, believing and relying upon the statements and representations, made by the said Watson, as to the condition, soundness and fitness of said stallion, for the purpose of breeding, and for the further reason that he was investing nothing in said stallion, or becoming in any manner responsible for said stallion, or paying any consideration therefor, signed said guaranty or contract, wholly relying upon the said statements and representations of said Watson as to the condition and fitness of said stallion for breeding purposes, his soundness and condition; which said statements and representations of said Watson as to the soundness, condition and fitness of said stallion as hereinbefore set forth were false and fraudulent and which the said A. C. Ruby Co. and Watson knew were false and fraudulent, at the time they were [14] made, and knew that the said defendant was relying upon said statements and representations, *and knew that the said defendant was relying upon said statements and representations* when he signed said guaranty.

For a further and third separate defense, defendant alleges:

I. That he is informed and believes, and upon such information and belief alleges, that the said plaintiffs J. M. Leiter and Floyd J. Campbell are copartners doing business in the city of Portland, Oregon, and that they and each of them are well acquainted with A. C. Ruby, doing business as A. C. Ruby Co., and that they know and are informed, as

to the methods, of the said A. C. Ruby, in the sale of stallions, and that they know and are informed that the said A. C. Ruby is dealing largely in defective stallions, and undesirable stallions, for breeding purposes, and that he is selling such stallions through the country for breeding purposes, and that they are each informed and know that these horses are represented to be fit and desirable for such breeding purposes, and that representations are made to purchasers of such horses, by the agents and representatives of A. C. Ruby, that said horses are sound, fit and desirable for breeding purposes, and that said horses when being offered and sold by said agents of A. C. Ruby Co. are misrepresented, and that the warranties and guaranties made and given by A. C. Ruby by and through his said agents representing A. C. Ruby Co. are untrue, and that said stallions are sold under false and fraudulent representations, and that notes are obtained in such transactions by fraud and trickery, and that the said plaintiffs know that many, if not all, of the notes obtained by the said A. C. Ruby Co. upon the sale of stallions are subject to defenses, on account of the misrepresentations made in the sale of stallions sold for which they are made, and the fraud and trickery, practiced in the obtaining of said notes, for sales or pretended sales of stallions, and that the said plaintiffs have knowledge of the likelihood of defenses against said notes, and had knowledge that there would likely be defenses against [15] the note upon which this action is brought.

II. That as defendant is informed and believes, the said plaintiffs are intimately associated with

A. C. Ruby, and that a portion of their business is the taking over under some arrangement and agreement by and between A. C. Ruby and these plaintiffs the promissory notes, obtained and received by A. C. Ruby as A. C. Ruby Co. upon the sales and pretended sales of stallions, for the purpose of placing them in the hands of pretended *bona fide* holders, before maturity, in order to defeat such defenses by the makers thereof, and that the said plaintiffs knew, or had reason to know, that the said promissory note upon which this action was brought was liable to defenses, by the said defendant, and that the note was not a valid subsisting liability of the said defendant, and that the same could not be collected by the said A. C. Ruby, Co., and that the said plaintiffs are not *bona fide* legal holders of said note, before maturity, for value, without notice of defects in said instrument, and without knowledge of such defects sufficient to require them to make inquiry as to the validity of said instrument.

WHEREFORE the said defendant demands judgment that the said plaintiffs take nothing by this action, and that the said defendant have and recover his costs and disbursements in this action sustained.

C. J. ORLAND,

Attorney for Defendant, Residence and Postoffice,
Moscow, Idaho. [16]

State of Washington,
County of Whitman,—ss.

Thos. S. Poindexter, being first duly sworn, says:
That he has read the foregoing answer and knows the

contents thereof, and that he is the defendant in said above-entitled action, and that he believes the facts stated in the above answer to be true.

THOS. S. POINDEXTER.

Subscribed and sworn to before me this 13th day of May, 1912.

[Notary Seal] W. W. RENFREW,
Notary Public, Residing at Farmington,
Wash.

Service accepted this 29th day of May, 1912.

FORNEY & MOORE.

[Endorsed]: Filed June 3, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [17]

*United States District Court, Central Division,
District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

CHARLES GILES,
Foreman.

[Endorsed]: Filed May 17, 1913. A. L. Richardson, Clerk. [18]

*In the District Court of the United States, District
of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys, Forney & Moore and Wilson & Neal, counsel for the plaintiffs, and C. J. Orland and J. T. Brown for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, with the verdict signed by the foreman, and, being called, answered to their names, and say, "We, the jury in the above-entitled cause, find for the defendant."

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed that said plaintiffs take nothing by their action, and that the defendant have and recover his costs and disbursements in this action sustained, amounting to the sum of \$179.50.

Judgment entered May 17, 1913.

[Endorsed]: Filed May 17, 1913. A. L. Richardson, Clerk. [19]

*In the District Court of the United States, of the
District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

**Order Extending Time to [July 17, 1913, to] File
and Serve Bill of Exceptions.**

On the application of the plaintiffs, through their attorneys, Forney & Moore and Wilson & Neal, it is ordered that the time in which to serve and file a Bill of Exceptions and statement of the case be extended sixty days from the 17th day of May, 1913, to the 17th day of July, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed May 22, 1913. A. L. Richardson, Clerk. [20]

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 23d day of June, 1913.
Present: Hon. FRANK S. DIETRICH, Judge.

No. 525—Central Division.

J. M. LEITER et al.

vs.

THOS. S. POINDEXTER.

**Order Extending Time to [August 2, 1913, to] File
and Serve Bill of Exceptions.**

It is hereby ordered that the time to file and serve
Bill of Exceptions in this cause be extended from
July 17, 1913, to August 2, 1913. [21]

*In the District Court of the United States, Central
Division, District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

**Order [Extending Time to September 2, 1913, to
Prepare and Serve Bill of Exceptions].**

On the application of Forney & Moore, it is ordered
that the time for preparing and serving Bill of Ex-
ceptions in the above-entitled cause be, and is hereby
extended, from August 2d, to September 2d, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 21, 1913. A. L. Richard-
son, Clerk. [22]

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 18th day of August, 1913.
Present: Hon. FRANK S. DIETRICH, Judge.

No. 525—Central Division.

[Order Extending Time to September 7, 1913, to File and Serve Bill of Exceptions.]

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

On motion of Messrs. Forney & Moore, attorneys for plaintiffs, ordered that the time to file and serve bill of exceptions herein be, and the same is hereby, extended for a period of twenty days from this date.

[23]

In the District Court of the United States Within and for the District of Idaho, Central Division.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Stipulation [That Respective Parties have No Amendments to Offer to Bill of Exceptions].

NOW COMES the respective parties hereto and by their counsel, stipulate and agree as follows:

THAT the respective parties hereto have no amendments to offer to the Bill of Exceptions presented and left with the Clerk for filing and settlement.

FORNEY & MOORE,
Attorneys for Plaintiffs.

C. J. ORLAND,
Attorney for Defendant.

[Endorsed]: Filed Oct. 1, 1913. A. L. Richardson,
Clerk. [24]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Bill of Exceptions.

This cause coming on regularly for trial, at the May term of the United States court, held at Moscow, Idaho, before the Honorable F. S. DIETRICH and a jury. Upon the trial of said cause the following proceedings were had and the following testimony was introduced and none other:

[Testimony of Samuel K. Watson, for Plaintiffs.]

SAMUEL K. WATSON testified on behalf of plaintiffs as follows:

Q. What is your full name?

A. Samuel K. Watson.

(Testimony of Samuel K. Watson.)

Q. I show you an instrument in writing marked Exhibit "A" for identification by the notary public taking the depositions of A. C. Ruby, J. M. Leiter and Floyd J. Campbell and ask you if you recognize the signatures on that instrument. A. Yes, sir.

Q. Whose are they?

A. The one on top looks like Mr. Poindexter's and on the line below is Henry Stroh's.

Q. Did you see them sign that instrument?

A. Yes, sir.

Q. Do you know Mr. Poindexter when you see him?

A. Yes, sir. [25]

Q. Do you see him here in the room?

A. Yes, sir.

Q. Where is he?

A. He is the gentleman sitting back of Mr. Orland and Mr. Brown.

Mr. NEAL.—I will now read the deposition of A. C. Ruby to the jury.

[Deposition of A. C. Ruby, for Plaintiffs.]

A. C. RUBY, a witness for the plaintiffs, called and sworn, testified as follows:

Q. Where do you reside, Mr. Ruby?

A. Portland, Oregon.

Q. How long have you lived in Portland?

A. I have been here for very nearly ten years; I have made this my residence for five years.

Q. Under what name do you do business?

A. A. C. Ruby Company.

Q. Who composes the firm of A. C. Ruby Company? A. A. C. Ruby.

(Deposition of A. C. Ruby.)

Q. Are you the sole owner of the company?

A. Yes.

Q. That is simply the name you do business under?

A. Yes; that was the way we started it up, but for the last six years there has been no one with me.

Q. I show you a paper and ask you to state what it is.

A. This is a note taken for a horse sold to Thomas S. Poindexter and Harry Stroh of Farmington, Washington.

Q. What did you do with that note, if anything?

A. I kept the note until the latter part of June, 1911, and then I sold it to Mr. Leiter and Mr. Campbell.

Q. The plaintiffs in this case? A. Yes. [26]

Q. Examine the back of the note and state whose endorsement is contained thereon.

A. Mr. Thomas Poindexter is endorsed for \$400.00 as a payment on the back.

Q. \$400.00 paid on the note? A. Yes.

Q. Are there any other endorsements on the note?

A. No.

Q. Is your name thereon?

A. Yes, I endorsed it when I sold it to Mr. Leiter and Mr. Campbell.

Q. What, if anything, was paid you for that note by Mr. Campbell and Mr. Leiter?

A. I have not got the exact amount of dollars. I can figure it up. I know how much I got all right. I discounted this note with some five or six others at 12 per cent. I got \$2,400.00 and the accrued interest

(Deposition of A. C. Ruby.)

less twelve per cent.

Q. That is, you received the face of the note with the accrued interest, less twelve per cent?

A. Yes, sir.

Q. Prior to the time you transferred the note to Mr. Campbell and Mr. Leiter, were there any other payments endorsed thereon?

A. No, no other payments.

Q. Do you know the signature of Mr. Stroh and Mr. Poindexter, whether that is their signatures or not?

A. I think they are. They are the same as I have seen on letters they have written.

By Mr. NEAL.—I now offer in evidence this note which is marked Plaintiffs' Exhibit "A." [27]

Cross-examination by Mr. ORLAND.

Q. Did Mr. Poindexter or Mr. Stroh, or either of them, ever pay \$400.00 on that note?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

Q. You may answer that question yes or not, and then explain, if you care to.

A. I don't think that it was paid in cash. It was, as I understood it, \$400.00 that Mr. Poindexter was to have in case he helped sell or find a buyer for the horse.

Q. Then, as a matter of fact, there has never been any cash paid upon that note?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

Exception allowed.

(Deposition of A. C. Ruby.)

A. I never received any cash except what I got from Mr. Leiter and Mr. Campbell.

Q. From which of the defendants have you ever received any letters?

A. The man that sold the horse, he received a number; and I have seen them, I believe, from both of them. Most all the correspondence was done between them and Mr. Watson, and he showed me the letters and cards.

Q. Have you ever received any letters from either of the defendants yourself?

A. Yes, I have. I believe they were mostly through some attorney up there.

Q. Have you any of those letters in your possession?

A. No, I turned them in, I believe, to Mr. Leiter and Mr. Campbell, but I am not sure. I have not got them now.

Q. How long have you known Mr. Leiter and Mr. Campbell? A. About three years. [28]

Q. Are your relations with them friendly?

A. Just in a business way.

Q. How long have you known Mr. Campbell?

A. I do not think quite three years.

By Mr. NEAL.—I suppose that is all that is pertinent to read, to the question as to whether or not the plaintiffs here are holders for value.

By the COURT.—Entirely so.

On the former trial I held this was a non-negotiable note. I would suggest to counsel for the defendant, if they will raise the objection to the materiality of

(Deposition of A. C. Ruby.)

this testimony that this question might be passed upon, and, if the same conclusion is reached as before, it would curtail the case.

By Mr. ORLAND.—Under the rules of the Circuit Court this would be proper in rebuttal.

By the COURT.—My own question was, if, as a matter of fact, it would not be in time if, as a matter of law, it would be immaterial.

By Mr. ORLAND.—I did not anticipate the question being raised at this time—

By the COURT.—There is nothing to discuss unless you object to it.

By Mr. NEAL.—It was raised before on my objection to their testimony.

By Mr. ORLAND.—It was raised on the question to direct a verdict. Of course, if the Court please, there are two versions to that proposition. One would be that it is non-negotiable and [29] the other is, if it be negotiable it is a forgery which would change it and *invalidate* in the hands of anybody. One is a question of fact and the other is a question of law.

By the COURT.—It was so determined before. I held it was non-negotiable and submitted the other question to the jury.

By Mr. ORLAND.—I will object to it as incompetent and immaterial.

By the COURT.—Your objection is to any testimony tending to show that the present plaintiffs are *bona fide* holders on the theory that it is not a negotiable instrument.

(Deposition of A. C. Ruby.)

By Mr. ORLAND.—I do. I wish to state that I have not the authorities here at this time.

By the COURT.—He has the leading oar. I do not care to hear authorities on either side.

By Mr. NEAL.—I take the position that the negotiable instrument act as passed by the Supreme Court has not in any way changed the negotiability of this note; and I take it that there is only one or two things that can make a note non-negotiable as laid down by the Circuit Court of Appeals, and that is where there is a condition put on the note that it must be in some-way qualified promise to pay, or make a condition in the note; and the promise must be the promise of the makers of the note, and before the note is rendered non-negotiable there must be something on the face of the note which makes the payment under a condition or the payment uncertain. I think the Court will find that this is almost unanimous in the decisions I have been able to find. I will say that in [30] the preceding trial I did not anticipate that the note was non-negotiable, as I had the same note in the State of Washington and the Judge, Judge Rudkin, held that it was.

I would like to call the Court's attention to the note. The only thing on this note that is different from other notes is this: "After a good and satisfactory examination of the Stallion Ithos and recognizing, etc., we the undersigned subscribers hereby purchase said stallion and hereby authorize the delivery of said horse to any one of the subscribers hereto," and then follows the ordinary promissory

(Deposition of A. C. Ruby.)

note used in Oregon.

Now, the Court will notice, by an examination of that note, that there is nothing in there to make the promise conditional. The promise is absolute to pay at a certain date to the order of A. C. Ruby. Some rulings are to the effect that where a note is payable to order that it was intended to be a negotiable instrument. Here is a case in Texas, which gives many authorities and lays down many cases on this point; *Buchanan vs. Wren*, 30 S. W. 1077, 9.

“Appellant contends that the instrument sued on is not negotiable (1) because it provides for the payment ‘on or before’ a given date, thereby making the time of payment uncertain; (2) because the promise to pay is conditioned upon a consideration which had not then been, and might never be, received; and (3) Because the note shows on its face that it is given for rent of a certain place for the current year, and consequently for an unearned consideration, and one which was subject to be defeated by anything which lawfully disturbed the possession of the tenant, or which extinguished the title of the landlord during the term of the lease.”

I take it that the second and third propositions are [31] those which the Court held was not negotiable; and that possibly there might be a failure to deliver. In other words, it was an executory contract and not a note and the makers have a defense against A. C. Ruby. As I remember it, that is the ground on which the Court held the note was not negotiable. Now, the second and third contentions are so nearly the

(Deposition of A. C. Ruby.)

same that they will be considered together,—

By the COURT.—As I recall my views at the time, this instrument is not denominated a note, but a contract, and in addition to the provisions of the ordinary promissory note it contains two other stipulations or agreements; one is an agreement to purchase and the other is an agreement that the horse may be delivered to any one of the subscribers. For that reason it contains two agreements which are not contained in a negotiable instrument. Not upon any stipulations or conditions, but that it is an ordinary contract of sale to purchase rather than a mere promissory note. I suggest those views in order that you may confine your argument more specifically to them.

By Mr. NEAL.—I will read the note at issue in this case: On or before the 1st day of November, 1893, I promise to pay R. A. Rutherford, or order, the sum of \$1,500.00 for the rent of the Reavelle farm, in Washington County, Texas, for the year 1893; this note to bear ten per cent interest per annum after maturity until paid, and if suit has to be brought on same for collection, ten per cent additional for attorneys' fees; note to be paid in the city of Austin, Texas, S. R. Buchanan.

By the COURT.—If that is the instrument I do not think I care to hear that argument. [32]

By Mr. NEAL.—The decisions refer to executory contracts.

By the COURT.—If that is a general discussion of that, you may read it if you think it is in point,

(Deposition of A. C. Ruby.)

because it is the only point about which I entertain any doubt.

I think there is nothing in these decisions that would change the decision reached in the former trial. The instrument, taken as a whole, contains three obligations on the part of the makers: One is an agreement to purchase the horse, and it is just as solemn a promise as to pay money. The second is, that the horse may be delivered to anyone of the subscribers; and the third is to pay a certain amount of money. While it is true you cannot change the nature of an instrument by calling it a certain name, the name may be sometimes considered as to the intention of the parties. This is what is called a "Stockholder's Purchasing contract," and while this is not controlling, while the question is not entirely free from doubt, I shall hold it is non-negotiable. I think to hold it is negotiable and permit it to be used as a negotiable instrument is not sound. The objection will be sustained.

By Mr. NEAL.—I presume I have a right to offer these depositions for the purpose of showing plaintiffs are holders for value of this note.

By the COURT.—Is there any question, Mr. Orland, as to the plaintiffs being holders in due course for value, or *bona fide* owners.

By Mr. ORLAND.—We admit they are holders of this instrument. We will admit they are in the shoes of Ruby Co. [33]

By Mr. NEAL.—In order to save the record, I desire to offer in evidence the depositions of J. M.

(Deposition of A. C. Ruby.)

Leiter, Floyd J. Campbell and A. C. Ruby. The depositions tend to support the proposition that we are holders of these instruments and *bona fide* holders for value. And if they are material to any other issue.

By Mr. ORLAND.—We object to the introduction of these depositions. They only go to the extent of purchase by Leiter and Campbell of the note and the *bona fides* of the transaction, and if the note is not negotiable, that cuts no figure, and the other part we are willing to admit that they stand in the shoes of A. C. Ruby. [34]

By the COURT.—The objection will be sustained. To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

By Mr. NEAL.—I will read the note to the jury.
(Note read to the jury.)

We rest.

Defendant's Evidence.

[Testimony of Thomas S. Poindexter, in His Own
Behalf.]

THOMAS S. POINDEXTER, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. ORLAND.)

Q. Give your name to the stenographer.

A. Thomas S. Poindexter.

Q. And where do you reside?

(Testimony of Thomas S. Poindexter.)

A. Farmington, Washington, is my address.

Q. You are the defendant in this action?

A. Yes, sir.

Q. How long have you resided at Farmington?

A. For the past twenty-eight or twenty-nine years.

Q. Do you know a man by the name of Samuel K. Watson ?

A. I know a man by the name of S. T. Watson.

Q. Is this the gentleman sitting here?

A. Yes, sir.

Q. When did you first meet him?

A. In February, 1911.

Q. About what time, if you remember?

A. Along about the first week or so.

Q. State under what circumstances you met him.

A. I met him at the Hotel Farmington.

Q. And what conversation did you have with him?

[35]

A. He was introduced to me as a man having a stallion he would like to sell and wanted someone to assist him he said, in selling this stallion.

Q. Were there any arrangements made at that time about you assisting him in selling this stallion?

A. Well, at that time, I do not think so.

Q. Did you see the stallion?

A. I did during the day.

Q. Where was the stallion?

A. It was in the livery barn.

Q. Were there any negotiations that day with reference to the stallion?

A. That day, or the next day, Mr. Watson pro-

(Testimony of Thomas S. Poindexter.)

posed for me to help him sell the stallion and he said he would give me an interest in him or pay me \$5.00 a day.

Q. And what was the price of the stallion?

A. Twenty-eight hundred dollars.

Q. And what did he offer to give you?

A. He offered to give me one share of the seven for assisting him in selling the stallion.

Q. Did you accept the proposition?

A. I told him that I might help him sell the stallion, as I rather liked that kind of a stallion, but that I did not care to take any interest in the horse myself.

Q. Was there any further negotiations between you and Mr. Watson with reference to assisting him or selling the stallion?

A. The next day when I come in to town Mr. Watson said he had found a man to buy the rest of the horse and I told him to let him have it all as I did not care to have any interest in it, and I told him I did not care to give any money for a share, but of course, if he would give me a share, why I would take it.
[36]

Q. Was there any other talk or negotiations between you and Mr. Watson with reference to this transaction?

A. Yes, sir; when he told me Mr. Stroh wanted to take the rest of the horse and that he had some papers there that he would give as security—

By Mr. NEAL.—I move to strike the answer out as incompetent and immaterial.

By Mr. ORLAND.—He was giving a statement be-

(Testimony of Thomas S. Poindexter.)

tween Watson and himself.

By the COURT.—The motion will be denied.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

A. He stated he had those papers there and showed me, as well as I remember, a mortgage and note on some lands down by Winona or Endicott, and he told me, or asked me, what I knew about the mortgage and note being good; and I told him I did not know, that he would have to find that out himself.

Q. Do you know what was done with that note and mortgage?

A. No, sir; he kept on for three or four days, and I introduced him to several men and talked the matter quite a lot for three or four days, and he said that Stroh had agreed to take the rest of the horse and he was willing to accept his papers, and he said that Stroh was ready to make out the papers and he was ready to turn over the horse.

Q. Now, state what Watson said to you with reference to the condition of the horse also.

By Mr. NEAL.—I would like to ask the witness if the guaranty with the horse was in writing.

By the WITNESS.—I did not receive a written guaranty with the horse. [37]

Q. What was stated to you, Mr. Poindexter, with reference to the condition and breeding qualities of this stallion which he was offering for sale.

By Mr. NEAL.—I think I would like to show the

(Testimony of Thomas S. Poindexter.)

witness a paper, as I do not want to take any advantage of him.

I would like to ask the witness if he did not identify that paper as having been received with the horse.

By Mr. NEAL.—To the witness.

Q. I will ask you whether or not you identified this as the written guaranty which you received with the horse? A. I do not remember.

Q. Did you not remember in the trial before, that you received that guaranty?

A. I said that it looked like my signature, but I did not remember of signing it.

Q. Is that your signature there?

A. I could not say.

Q. You do not know whether it is or not?

A. No, sir.

Direct Examination.

Continued by Mr. ORLAND.

Q. You may state what conversation you had with reference to this horse in your negotiations with Mr. Watson with reference to purchasing or selling the stallion.

By Mr. NEAL.—I object to that for the reason that the guaranty was in writing and that is the best evidence; and the Court knows it was admitted at the trial of this case before, that there was a written guaranty with the horse, and that is the best evidence.

By the COURT.—It does not appear in this case that there was and [38] therefore the objection will be overruled.

(Testimony of Thomas S. Poindexter.)

To which ruling of the Court the plaintiff then and there excepted, and which exception was duly allowed.

A. Mr. Watson told me in assisting him to sell the horse that I would have to sign no papers whatever; that there would be no papers for me to sign, and he would give me a share in the horse. I told him that I did not care to take a share in the horse to pay any money, but would take a share if he would give it to me, but no other way.

Q. Now, when he asked you to assist in selling the horse, what did he tell you about his condition as to being a good breeding horse?

By Mr. NEAL.—The same objection.

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

A. He told me that the horse was a good horse, good for breeding purposes, a Percheron horse and so on; and I looked the horse over and asked him if the horse was not thick-winded, and he said that the horse had had the distemper, that he was an imported horse and had not gotten over it, but that was all that ailed the horse, and nothing more.

Q. Mr. Poindexter, you may look at that instrument, and state whether you ever saw it before; that is, prior to the time of the other trial.

A. The first time I ever saw this paper in this form was in August, 1911, sometime.

Q. And where did you see it?

(Testimony of Thomas S. Poindexter.)

A. In the bank at Farmington.

Q. Under what conditions did you see it at that time? [39]

A. The banker informed me that he had a note there and I went in to investigate and this is what I found.

Q. That is your signature, is it not?

A. Yes, sir.

Q. You may state the condition of that paper since you signed it.

A. When I signed the paper there was nothing made out in the way of a note. It was blank, only the printed part, and when the papers were made out he was ready to close the deal and turn over the horse; that Mr. Stroh had given a note and mortgage on some land.

Q. Mr. Watson told you that?

A. Yes, sir, and that he was not ready to make out the papers to finish up the deal, I says, "I have no papers to make out, and what have I got to do with that," and he says, "you will have to sign the contract before I can deliver the horse over to you." I said, "Very well," and "What kind of a contract have you got? I will look at it." He showed me and I told him that I did not like to sign any contract like that and asked him if he had any other. He told me that was the only contract that the company furnished and I told him I did not like to sign a blank like that, and I stood a little and says to myself that a big company like that would not try to beat a man, and I signed my name to the purchasing contract and

(Testimony of Thomas S. Poindexter.)

there was nothing in it but the blanks on that date.

Q. None of the writing from the top down was in there? A. No, sir, it was blank down there.

By Mr. NEAL.—We object to the question and answer upon the ground that the plaintiffs are *bona fide* purchasers for value.

By the COURT.—The objection will be overruled.
[40]

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

Q. You may state if there was any indorsement upon the back of this instrument of any payment having been made thereon.

A. No, sir; nothing endorsed on it whatever. It was nothing but a plain stockholders' purchasing contract, and he stated, as I said before, that it was the only kind of a contract the company had.

Q. Is that Mr. Stroh's signature?

A. Yes, sir. He was there in the office and comes right up and sits down and signed his name.

Q. Had those words been in there when Mr. Stroh signed it?

A. No, sir; because I just got up from the table and he gets up and signs his name.

Q. What, if anything did you pay on that contract?

A. I did not pay any money to Mr. Watson. He said that he wanted to show Mr. Stroh that I had an interest in this horse, and I told him I did not know what way he was going to show it. He says, "I will make out a check and you sign it back to me, and

(Testimony of Thomas S. Poindexter.)

that will make a showing that you have a share in the horse.”

Q. State if you ever saw that instrument before.

A. Yes, sir.

Q. From whom did you get it?

A. From Mr. Watson.

Q. Does that represent all the interest you had in this horse?

A. Yes, sir, that is all the interest I had whatever.

By Mr. ORLAND.—I offer this certificate in evidence as Defendants’ Exhibit #1.

By Mr. NEAL.—I object to it as incompetent, irrelevant and immaterial. [41]

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

By Mr. ORLAND.—“Capital Stock, \$2800.00. Number of shares 7. Certificate of Stock. This is to certify that we have sold to Mr. Thomas Poindexter one share of stock valued at \$400.00 paid in full per share, in the Imported Percheron Stallion named Ithos, No. 53347 (83515). Dated at Farmington, State of Wash., this 14th day of Feb. 1911. The A. C. Ruby Co. of Portland, Oregon, by S. K. Watson, Agent.”

Q. Now, Mr. Poindexter, did the inducement—or what representations were made to you by Mr. Watson which induced you to take this interest in the stallion, as to the condition of that horse and his value for breeding purposes.

(Testimony of Thomas S. Poindexter.)

By Mr. NEAL.—That is objected to as incompetent, irrelevant and immaterial.

By the COURT.—The objection will be overruled and you may have an exception.

Q. Is there anything further you have not stated with reference to the statements Mr. Watson made that induced you to enter into this agreement?

A. No, sir, only that he stated if there was anything wrong with the horse that they would replace the horse without any cost to us, and we told him that something seemed to be the matter with his wind, and he said it was only the distemper which he had not quite recovered from, but should anything come wrong with him, they would make it good without any expense to us. [42]

By Mr. NEAL.—I move to strike out all the evidence of the witness, the witness having testified that it was not in accordance with the contract.

By the COURT.—The objection will be overruled.

To which ruling of the Court, the plaintiffs then and there excepted and which exception was duly allowed.

Q. What did you find, if anything, to be the trouble with this horse as to his condition, after signing the papers?

A. We found the horse was very thick winded a few days after that.

Q. What do you mean by that?

A. When we took the horse out to move him around he blowed terrible and did not seem to be able to stand it. When we went to move him from one

(Testimony of Thomas S. Poindexter.)

place to another in standing him, he would have to go very slow, and if we seen anybody coming we would generally let him slow down and get his breath so that nobody would note it as they would not want to breed to him.

Q. What do you mean by getting his wind?

A. He was badly wind-broken.

Q. Did you breed the horse any that year?

A. Yes, sir; I think to twenty-eight mares during the season.

Q. Did you get any colts? A. Yes, sir, five colts.

Q. What reliance did you place upon Mr. Watson's statements with reference to this horse, in taking the horse, or an interest in the horse?

By Mr. NEAL.—We object, upon the ground that it is incompetent, irrelevant and immaterial, and upon the further ground that [43] the written guaranty is the best evidence.

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted and which exception was duly allowed.

A. Well, I relied on Mr. Watson's statement that the horse was all right, and also on the guaranty.

By Mr. NEAL.—What statement did you rely upon?

By the COURT.—To the Witness. What do you mean when you say guaranty?

A. The guaranty that I signed before he could turn the horse over.

Q. This note, do you mean?

(Testimony of Thomas S. Poindexter.)

A. Yes, sir, this purchasing contract.

Q. Do you remember signing any other instrument except that one?

A. No, sir; as Mr. Watson told me I would not have any papers to sign.

Q. Do you know what became of the horse?

A. Yes, sir.

Q. How long did you and Mr. Stroh—in whose possession was this horse?

A. Mr. Stroh kept the horse.

Q. How long did he keep the horse?

A. He kept him until some time in July.

Q. And you bought him on February 14, 1911.

A. Yes, sir.

Q. And then what became of the horse?

A. Mr. Stroh taken the horse to Portland as they had told him if he brought the horse back—

By Mr. NEAL.—We object to what this witness told Mr. Stroh as hearsay. [44]

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. They told me.

Q. What did they tell you?

A. They told me if I taken the horse back to Portland they would take the horse back and pay all expenses and give us another horse.

Q. Now, what—or, who told you?

A. Ruby Company.

Q. Did they write you letters? A. Yes, sir.

(Testimony of Thomas S. Poindexter.)

Q. At the time Mr. Stroh took the horse back to Portland where—were you aware that you had signed a note for \$2,800.00? A. No, sir.

Q. When did you say you first became aware of that?

A. Some time in August, when it was presented to me at the Farmington Bank. That is the first I ever knew of such an instrument.

Q. Do you know what finally became of that horse?

A. The last I knew of the horse, he was still in Portland in care of Mr. Walker, a livery-stable man.

Q. Do you know whether that horse was offered back to Ruby & Company or not?

A. I was not there.

Q. You was not there when it was offered back to Ruby & Company? A. No, sir.

Q. Did you have any talk with Mr. Watson or Mr. Ruby in Portland when down at Portland?

A. Mr. Ruby was not there. [45]

Q. Did you have any conversation with Mr. Watson with reference to the return of this horse?

A. I do not think Mr. Watson was there either.

Q. With whom did you converse, if anybody?

A. Mr. Neal.

Q. Did you talk to anybody at the Ruby Company barn? A. I was not there.

Q. You do not know anything about the offer to return the horse to Ruby and company, only what Mr. Stroh told you? A. No, sir.

Q. But you do know that the horse was shipped to Portland, do you? A. Yes, sir.

(Testimony of Thomas S. Poindexter.)

Q. Was there any indebtedness owing by you to Ruby & Company upon this horse, or, for any other purpose? A. None whatever.

Q. What consideration, if any, have you received for this instrument? A. None whatever.

Q. Did you ever, or, what authority did you give to Mr. Watson, to endorse \$400.00 payment upon that note?

A. I never gave anyone that authority.

Q. And you had no knowledge of it until it was presented to you? A. No, sir.

Q. What authority did you ever give, if any, to anyone to fill in that note, or, make a promissory note of it? A. I never gave anyone that authority.

Cross-examination by Mr. NEAL.

Q. You were a witness in this case last November here, were you not? A. Yes, sir.

Q. And you examined at that time, Plaintiffs' Exhibit "A," [46] did you not? A. Yes, sir.

Q. And that is your signature? A. Yes, sir.

Q. Now, as I understood you, you read this over carefully before signing it? A. Yes, sir.

Q. And you did not understand at all you were signing a note, did you?

A. There was no note there; only a blank form.

Q. You examined everything on the paper, did you? A. Yes, sir.

Q. And when you saw this portion of this instrument, what did you think about it—"For value received I promise to pay to A. C. Ruby Company, the sum of blank dollars, payable at the Merchants' Na-

(Testimony of Thomas S. Poindexter.)

tional Bank, Portland, Oregon, in payments as follows: with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment, I agree to pay reasonable attorney fees." Did you see all that?

A. Yes, sir, all that was printed.

Q. And you thought you were merely signing a receipt for a horse? A. Yes, sir.

Q. And you did not understand it was a note?

A. No, sir, it was in blank form and Mr. Watson told me that I would not have to sign any note.

Q. Just tell the jury what you thought it was.

A. I told Mr. Watson that I did not want to sign a paper like that. [47]

Q. But what did you think you were signing?

A. I did not feel that I owed Ruby & Company anything at all, and I did not owe them one cent, but I signed the contract to receive the horse. Watson told me I had to sign the contract in order to receive the horse and I did look at it.

Q. I will ask you to examine Plaintiffs' Exhibit "F" in the former trial and state if that is your signature on that paper?

A. That looks like my signature but I never signed no such paper as that.

Q. That is your signature, is it not?

By the COURT.—Can you say whether it is your signature?

(Testimony of Thomas S. Poindexter.)

A. It looks like my signature.

Q. Is that not your signature?

A. It looks like it, but I do not remember signing any such a paper.

Q. Do you not know that is your signature?

By the COURT.—State whether or not it is your signature in your judgment.

A. It looks like my signature but I never signed any such a paper.

By Mr. NEAL.—I offer this in evidence as Exhibit “F.” Exhibit “F” reads as follows: “Farmington, Washington, 2/17th, 1911. This is to certify that we, the undersigned, have received from S. K. Watson for the A. C. Ruby Company, the Percheron Stallion Ithos No. 53347 (No. 83515) in good condition and every way as represented by S. K. Watson in the sale of said stallion. Thomas S. Poindexter. (Seal) Henry Stroh (Seal). Witness W. W. Kersten.” [48]

Q. Now, Mr. Poindexter, if this was a receipt for the horse, why was it you signed that paper? If Plaintiffs’ Exhibit “A” was a receipt for the horse why was it Plaintiffs’ Exhibit “F” was presented to you and you signed it? Can you explain that?

A. I never signed with any man by the name of Kersten whatever.

Q. You signed that paper, did you not?

A. No, sir, that I know of, I did not.

Q. You testified in this case with reference to that paper before? A. I suppose I did.

Q. Do you remember what you testified to at that time?

(Testimony of Thomas S. Poindexter.)

A. I said that I did not remember signing that paper.

Q. I want to call your attention to what you did say. While I am looking for that, I will ask you about this other paper. Now, I show you Plaintiffs' Exhibit "G" in the former trial and ask you to examine that paper and see if that written guaranty was received by you and Stroh upon the sale and receipt of the stallion in question.

A. I do not remember of signing this paper.

Q. Is that your signature? A. It looks like it.

Q. Do you know whether it is or not?

A. No, sir, I could not state for sure.

Q. Do you know your signature when you see it.

A. I do, yes.

Q. Is that it?

A. I say it looks like it, but I do not remember of ever signing that paper.

Q. I show you a postcard, dated Farmington, Washington, March 6, 1911, Plaintiffs' Exhibit "E," in the former trial, and ask you if you recognize your signature on that?

A. That is a different signature from what I always sign my name. [49]

By the COURT.—Is that your signature?

A. Sometimes I sign my name this way, and possibly that is it.

Q. Do you not know that on the other trial you admitted that was your signature? A. Yes, sir.

Q. I show you Exhibit "D," and ask you if that is your signature? A. It looks like it.

(Testimony of Thomas S. Poindexter.)

By Mr. NEAL.—I offer the postcards in evidence and will ask to have them marked as Plaintiffs' Exhibits "D" and "E."

Q. Did you sign an application for insurance on this horse?

A. Yes, sir, I think we taken out insurance.

Q. Examine that paper and see if you find your signature down on the bottom right-hand corner.

A. Yes, sir, I think it is.

Q. Do you know that is your signature?

A. Yes, sir. I remember signing a paper for that purpose.

By Mr. NEAL.—I now offer this application in evidence and will ask that it be marked Exhibit "A-2."

Q. Now, when did you sign the application for insurance with reference to the time you signed the receipt for the horse. Was it done at the same time or a different time?

A. Which one do you mean?

Q. I mean the paper you signed for the insurance. Did you sign that at the same time you signed the receipt for the horse? A. I did not say I signed it.

Q. Did you not say that was your signature?

A. I said it looks like it. [50]

Q. Did you sign any other paper at the time you signed the receipt for the horse, or did you see only the one paper?

A. I signed this paper, but I do not remember signing any other on that date.

Q. And where were you when you signed that?

(Testimony of Thomas S. Poindexter.)

A. I could not say just where I was, but I was in the town of Farmington.

Q. You do not know whether you were in the hotel or not?

A. No, sir, I could not say, but I think I likely was.

Q. Do you know who was present when you signed that? A. No, sir, I could not say.

Q. Now, calling your attention to Plaintiffs' Exhibit "G," which is the guaranty you received on the horse, I will ask you if you did not testify at the former trial that you received a written guaranty on the horse? Do you remember?

A. I could not say now that I did.

Q. You could not say now that you testified to that before? A. No, sir.

Q. Is your memory not as good now as it was last November? A. Well, I suppose it was.

Q. You know, do you not, whether you had any written guaranty or not?

A. I think he gave us a guaranty.

Q. Do you not know that he did?

A. But as I tell you, I do not remember of signing any guaranty.

By the COURT.—You think he gave you a printed guaranty.

A. I think we did have one, but that is all I remember. I do not remember of signing any guaranty. [51]

Q. Now, as I understood you, you only signed one paper, you say now, outside of the application for insurance.

(Testimony of Thomas S. Poindexter.)

A. Yes, sir; that is all I remember signing was that contract. He told me I would not have any papers to sign at first.

Q. Now, Mr. Poindexter, I call your attention to this question which was put to you on the trial of this case last November and ask you if you did not answer the following questions in the following way:

“Q. I now show you Plaintiffs’ Exhibit ‘G’ and ask you to examine that and state if you recognize the two signatures on the left-hand corner,” and you answered: “Yes, that looks like mine.”

A. I said it looked like mine.

Q. I then asked you: “Is that not your signature?” and you answered, “It looks like it; yes, sir,” “And that is Mr. Stroh’s” and you answered, “Yes, sir, it looks like it.” So, then, you at least did sign two papers and this guaranty?” and you answered, “Yes, sir.”

A. I said it looked like my signature.

Q. You say at this time you do not think you signed that guaranty?

A. I say I do not ever remember of signing that.

Q. Did you say at the former trial that you signed it?

“Q. So, then, you did at least sign two papers?” and in answer to that question you answered, “Yes, sir.” There is no equivocation about that, is there?

A. I might have misunderstood it.

Q. I will ask you if you did not answer this question: “And you signed that the same day you did Exhibit ‘A’?” and you answered: “Yes, sir, I guess

(Testimony of Thomas S. Poindexter.)

I did; that is the only day I signed." Do you remember that testimony? [52]

A. I answered, "Yes, that is the only day I signed any papers."

Q. You remember, now, signing the application for insurance on February 17, and the purchase was made on the 14th.

A. Yes, sir, but the insurance seems to be dated before that; the 11th, I think.

Q. Now, I want to get this clear. I want to know what you want the jury to understand; whether you signed these papers I have shown you, Plaintiffs' Exhibit "A," "F," "G"; I want you to tell the jury now whether you signed all three of these, or just the one, Plaintiffs' Exhibit "A."

A. Well, sir, I do not remember anything about that paper whatever.

Q. Referring to Exhibit "F"?

A. Yes, sir; and this paper I do not remember signing that, but it looks like my signature. I think he gave us that guaranty but I do not remember of signing it.

Q. Then you think you were mistaken about it awhile ago when you said you did not sign it?

A. I said about the paper.

Q. You testified in November that you signed it?

A. I did not aim to.

Q. Did you not testify positively that it was your signature and Stroh's signature on that contract?

A. I said it looks like it.

Q. You testified in November that you signed it?

(Testimony of Thomas S. Poindexter.)

A. I did not aim to.

Q. Did you not give this answer in answer to this question: "So then you did at least sign two papers in connection with this guaranty?" Answer, "Yes, sir."

A. I did not aim to. I meant to answer just like this here.

Q. You have refreshed your memory somewhat since the other trial?

A. Somewhat, yes, sir. [53]

Q. Have you discussed the matter of this instrument here, as to its condition and contents, since you signed it, the Exhibit "A"?

A. No, sir, I think I gave about the same evidence as I did before.

Q. You testified before that you never saw Exhibit "A" until it came to the bank for collection.

A. Yes, sir; that is what I swore to before.

Q. You are positive about that now?

A. I said not in that form. It was not filled out.

Q. You claim you testified you saw it in the form it is with the ink portion left out.

A. Yes, sir.

Q. Did it not occur to you to be rather a piece of careless business to sign a paper in that form?

A. No, sir; I stopped there and studied about it awhile and thought that a big company would not try to beat a man. I did not like to sign the paper before and I asked Watson if he did not have any other form and he said that he did not, and I studied about it awhile and finally concluded that a big company like that would not beat a man and that I

(Testimony of Thomas S. Poindexter.)

would sign it. I did not think about a man trying to beat me.

Q. You thought you were getting \$400.00 for nothing?

A. I thought I was getting \$400.00 in this way. I did not do very much and I did not do anything to speak of, and I did not expect anything, but he kept hanging on to give me a share in the horse, but I did not care for a share in the horse, all I wanted being that the horse should be in the country and I told him that—

Q. You liked the looks of the horse, did you not?

A. Yes, sir.

Q. Where was you when you signed Plaintiffs' Exhibit "A"? A. In the hotel office. [54]

Q. And who was present?

A. Watson, Haines, Stroh and myself.

Q. And was Mr. Sullivan there?

A. No, sir, I do not know him.

Q. Do you remember seeing that gentleman there? That is Mr. Sullivan. A. Yes, sir.

Q. I will ask you if at the time the note was presented to you for signature, that if Mr. Watson did not write it out on the showcase in your presence, and in the presence of Sullivan when no one else was present except the three of you, and after it was written out for signature you objected to signing it and said, "If I sign that I will be liable for the full \$2,800.00." A. No, sir, I did not.

Q. I will ask you, further, if you did not know that the horse was being sold for \$2,800.00.

(Testimony of Thomas S. Poindexter.)

A. Yes, sir.

Q. And you understood that Ruby & Company were to receive \$2,800.00 for the horse less the \$400.00?

A. I knew at that time that Stroh was to get six shares.

Q. And I will ask you if you did not understand that you were to get one share for signing the joint note. A. No, sir.

Q. I will ask you if you did not state at that time that if you signed it, you would be liable for the full amount. A. No, sir.

Q. I will ask you if you did know it was a joint note.

A. Yes, sir, I knew; but it was not filled in. I thought that it could be filled in and that is why I objected to it. [55]

Q. Now, why was it that you did not ask him to fill it in before you signed it?

A. Because I never dreamed of such a thing.

Q. Are you in the habit of signing blank notes?

A. No, sir, because I do business for cash and give no notes to anybody.

Q. You made a trip down to Portland in 1912?

A. Yes, sir.

Q. Prior to your coming down there, you had been sued by Henry Stroh, had you not?

A. No, sir, I never had any papers served on me.

Q. You did not know that you had been sued?

A. No, sir.

Q. I show you Plaintiffs' Exhibit "I" and ask

(Testimony of Thomas S. Poindexter.)

you to examine the signatures on the bottom there and state if you signed that.

A. Must I answer before I read it or not? It looks like my signature. I would like to see the paper.

Q. We produced it here at the other trial. That is it, is it? A. That is my signature.

By Mr. NEAL.—We offer it in evidence and ask to have it marked Plaintiffs' Exhibit "I."

(By Mr. ORLAND.)

Q. Under what conditions was this instrument signed by you and Mr. Stroh?

By Mr. NEAL.—I object to the question as the document shows on its face what it is for.

By the COURT.—Let me have it, please.

By Mr. ORLAND.—That was a matter of compromise and settlement and it [56] does not pertain to the issues here.

By Mr. NEAL.—You do not claim it is a matter of compromise in this case.

By Mr. ORLAND.—No, sir, it is entirely foreign to this.

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. This paper was under the condition that I should make settlement with Ruby & Company or Leiter and Campbell. That paper was made out under conditions that if I should make settlement with them, then I was to pay for the horse and Stroh

(Testimony of Thomas S. Poindexter.)

would turn the horse over to me; and when Stroh went to Portland and came back to Farmington, I had no interest in the horse whatever, but under the conditions that I make a settlement with Leiter and Campbell of this note I was to turn over, he was to turn over the horse to me so that I would get something for my money.

By Mr. NEAL.—It shows that these two parties recognized this note, if the Court please.

By Mr. ORLAND.—It was only when Mr. Poindexter thought he was stuck for this note that this agreement was made, and that he would like to get out of it some way.

By the COURT.—The objection will be sustained.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

(By Mr. NEAL.)

Q. I want to ask the witness further in reference to the [57] guaranty, Plaintiff's Exhibit "G." I find some more testimony. I will ask you if you were not asked this question: "I would like to ask the witness with reference,—was that in writing or a verbal guaranty." It was verbal. "Q. Did you afterwards get a written guaranty?" Answer: "Yes, sir, he gave us a written guaranty." What did you refer to, Plaintiffs' Exhibit "G"?

A. I referred to Plaintiffs' Exhibit "G."

Q. I will ask you if at the time you came to Portland, if you remember the circumstances of requesting me to wire A. C. Ruby who was then in New

(Testimony of Thomas S. Poindexter.)

York, whether or not he would give you another horse in the place of the one Stroh had in case you made a settlement with Mr. Stroh.

A. Yes, sir, I read your telegram to Mr. Ruby.

Q. And do you remember me showing you this telegram, marked Plaintiffs' Exhibit "P," which was received from Mr. Ruby?

A. I think you presented such a thing to me.

By Mr. NEAL.—I now offer it in evidence as Plaintiffs' Exhibit "P."

Q. I now show you Plaintiffs' Exhibit "K" at the former trial.

Q. I show you Plaintiffs' Exhibit "K" and ask you if that is the telegram you received from Mr. Ruby.

A. I suppose it is. I got two or three letters and two or three telegrams from Mr. Ruby, but I had no horse or interest in any, nor nothing whatever to trade.

Q. Then why, I ask you, did you ask me to telegraph to Ruby if you had no horse? Tell the jury about it.

A. When I found out in August, I found out that they had a note, I saw that it might cost me something to get out with a lawsuit and so I investigated to see,—so that if it would cost me \$500.00 or \$600.00, thought it would be the best thing to do, was to go to Portland and make a compromise [58] settlement, as I saw I had got into it when I found out the note was fixed up against me in this kind of a shape, and that is the way I went to Portland.

(Testimony of Thomas S. Poindexter.)

By Mr. ORLAND.—Why have you not produced the original telegram, Mr. Neal?

By Mr. NEAL.—Because it is in New York. I will offer this telegram in evidence.

By the COURT.—You may be relieved of taking exceptions, and all adverse rulings will be deemed to have been excepted to.

By Mr. NEAL.—I will read Plaintiffs' Exhibit "R," a postcard addressed to A. C. Ruby Company at Portland, Oregon, reading as follows:

"Farmington, Wash., 3-6-11. A. C. Ruby & Co., Portland. Dear Sir: I written to you about a week ago in regard to a note given Mr. Watson when here by Henry Stroh for ins on that Percheron Colt we bought he wants to take up the note so please send it here for collection or let me hear from you at once. Yours truly, T. S. Poindexter Sec."

Plaintiffs' Exhibit "D" reads as follows: "Mr. S. K. Watson, Moscow, Idaho (forwarded to Garfield, Washington). Farmington, Was., 2-25-11. Mr. S. K. Watson. Dear Sir: Send Stroh's note here to me or to the bank and he will pay it the Inst note. I will also write to Ruby & Co., at Portland as I don't know where you are for sure. Horse is fine. Yours truly, Thos. S. Poindexter.

By Mr. NEAL.—I will read now Exhibit "A" to the jury: [59]

"Stockholder's Purchasing Contract. Feb. 14th, 1911. After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347 owned by The A. C. Ruby Co., of Portland, Oreg., and recog-

(Testimony of Thomas S. Poindexter.)

nizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said stallion of The A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00. Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred 00/100 dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows: One Thousand and no/100 Dollars, Oct. 1st, 1911; Nine Hundred and no/100 Dollars, Oct. 1st, 1912; Nine Hundred and no/100 Dollars, Oct. 1st, 1913; with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorney fees. Thos. S. Poindexter. Henry Stroh." And on the back is endorsed as follows: "2/17/1911. Paid by Thos. S. Poindexter \$400.00 one third to be applied on each of the three payments."

Exhibit "G" reads as follows: "The A. C. Ruby Co. Importers and Breeders of Percheron, Belgian, Shire and German Coach Stallions. 900 Sandy Road, Portland, Oregon. References: American National Bank, Pendleton, Oregon, Merchants National Bank, Portland, Oregon. Portland, Oregon, February 14th, 1911.

KNOW ALL MEN BY THESE PRESENTS:

(Testimony of Thomas S. Poindexter.)

That we have this day sold the Imported Percheron Stallion named Ithos [60] No. 53347 (83515), to the following Persons. Thos. S. Poindexter, P. O. Farmington, Washington, Henry Stroh, P. O. Farmington, Washington. Purchase price Twenty Eight Hundred — 00/100 \$2800.00 Dollars. GUARANTEE—If the above stallion does not give satisfaction in every way and get sixty per cent of the producing mares, that are properly bred and returned for second trial at the end of the third week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished, we agree to furnish another stallion of the same price and quality, upon delivery of the above named stallion in as good condition as he is at present, at our barns in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder or true to pedigree. Should the above-named stallion not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by the purchasers, or any verbal or written

(Testimony of Thomas S. Poindexter.)

contracts or changes made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations or guarantees were made to them, as an inducement to purchase said [61] stallion, or otherwise; except those contained in this instrument, and it is understood that The A. C. Ruby Co., is not to be held liable upon any other warranty or representation except those contained in this instrument.

In case of the above-named stallion's death, or any ailment that would render him unfit for services within four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn same over to The A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof. The A. C. Ruby Company by A. C. Ruby. (Signature of Purchasers and address.) Accepted by Thos. S. Poindexter, 1 share, Farmington, Washington, Henry Stroh, 6 shares, Farmington, Washington."

I will now read Exhibit "P," being a telegram from A. C. Ruby, from New York, on a day letter blank of the Western Union Telegraph Company.

(Testimony of Thomas S. Poindexter.)

“New York, Jan. 5, 1912. Wilson and Neal, Room 631, Chamber of Commerce, Portland, Oregon. I will give them any horse they want will guarantee satisfaction I would not pay any costs or expense and would want everything cleared up and cash or notes secured will hardly be home before eleventh [62] if not settlement made you should get service on them in Portland. A. C. Ruby. 6:14 P. M.”

Exhibit “K” is another,—or a letter from Mr. Ruby to Mr. Poindexter, and reads as follows:

“Portland, Ore., Jan. 25, 1912. Mr. Thos. S. Poindexter, Farmington, Wash., Dear Sir: My new shipment of horses are now at home and getting in good shape. Come down and make your selection, according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they don’t look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming. Respectfully yours.”

A. About Mr. Stroh giving the note, I would like to state in regard to those postcards. He gave a note as to his part of the insurance.

Q. I will ask you, Mr. Poindexter, if it is not a fact that at the time you was in Portland that you also had me wire to Forney & Moore, attorneys in this case, for the purpose of finding out what the costs were in this case in order that it might be settled, and I received their answer and figured up the entire

(Testimony of Thomas S. Poindexter.)

amount with costs and interest and you agreed to send me a check in full settlement when you got home.

By Mr. ORLAND.—We object as incompetent, and, it is a matter of compromise settlement.

By the COURT.—Sustained. To which ruling of the Court, the plaintiffs then and there excepted, and which exception was duly allowed. [63]

Q. Now, at the time you signed the application for insurance you paid your part of the premium on this policy in the case, in cash.

A. I paid my part; yes, sir.

Q. And Mr. Stroh gave a note for his part?

A. Yes, sir.

Q. Now, Mr. Poindexter, you never found out if there was anything wrong with this note until after you found out that Stroh disposed of all his property and was not responsible, and that you were going to have to pay the *entire* of the note?

A. I do not understand the question.

Q. You never found out there was anything wrong with this note until after you found out that Stroh had disposed of all his property and was not responsible, and that you were going to have to pay the entire amount of the note?

By Mr. ORLAND.—We object on the ground that it is incompetent and immaterial; and upon the further ground that there is no evidence here that Mr. Stroh has ever at any time disposed of his property.

By the COURT.—Sustained. To which ruling of the Court the plaintiffs then and there excepted and which exception was duly allowed.

(Testimony of Thomas S. Poindexter.)

Q. I will ask you if you did not tell me in Portland that Stroh had disposed of his property and it was up to you to settle the matter?

A. What is the question?

Q. Did you not tell me in Portland when you were there [64] that Stroh had disposed of all his property and it was up to you to settle the matter?

A. I could not say whether I did or not.

Q. Mr. Ruby has at all times offered to give you another horse, has he not?

A. He has offered several times to give me another horse but I never had any horse to trade.

Q. You had this one, did you not?

A. I did not. I turned in my share over to Stroh when he went to Portland.

Q. I will ask you if in the agreement you had with Stroh, Plaintiffs' Exhibit "I" for identification, he did not transfer title of his interest to you?

By Mr. ORLAND.—We object as incompetent and immaterial.

By Mr. NEAL.—I now offer this for the purpose of contradicting the witness when he said he never had any horse, as it shows there it was transferred to him absolutely.

By the COURT.—Mr. Orland, have you any objection to the instrument going in.

By Mr. ORLAND.—Certainly I have, because the instrument is the best evidence of that, and it has been ruled out as being a compromise. There is a condition in there also as to the title.

By the COURT.—Proceed with your other mat-

(Testimony of Thomas S. Poindexter.)

ters. I will look over this.

Q. Mr. Poindexter, I will ask you if you ever made a trip down to Colfax to see S. K. Watson after you signed Plaintiffs' Exhibit "A." [65]

A. I do not remember.

Q. Do you not know that you did?

A. I might have went but I do not remember.

Q. At that time, did you not tell Mr. Watson that Mr. Stroh had disposed of all his property and you asked him if you could get Stroh to secure the amount of the liability that he would relieve you from liability? A. I do not remember.

Q. Do you remember seeing Watson down at Colfax? A. No, sir.

Q. Did you receive a statement from Mr. Watson in regard to it at that time?

A. I do not remember of any.

Q. How long after you had the horse was it that you found out he was worthless?

A. I cannot say for sure. We depended on his being as Watson stated; that he had the distemper and we kept waiting for him to get over it and finally Stroh told me when we went to take him over to Tekoa he could not take him to stand as he was badly wind-broken.

Q. How long did you keep the horse?

A. Until July, 1911.

Q. The same year you bought him?

A. Yes, sir.

Q. And I believe you testified that you did not know of it, what Stroh did with the horse after he

(Testimony of Thomas S. Poindexter.)

took it to Portland?

A. No, sir, I do not know only just what he told me.

Q. Mr. Poindexter, did you ever notify Mr. Leiter that the signature on this Exhibit "A" was a forgery; that you had never signed it at all?

A. I could not say.

Q. Did you claim it was a forgery at any time; or did [66] you always claim that you signed it?

A. I claimed it was not filled in when I signed it.

Q. But your signature was on it? A. Yes, sir.

Q. I want to show you a letter dated September 4, 1911, and addressed to J. M. Leiter, and ask you to examine the signature on the back and see if you recognize that.

A. Yes, sir, that looks like mine.

Q. It is yours, is it?

A. Yes, sir, it looks like mine.

Q. And it is yours, is it not?

A. Yes, sir, *I written* that just the same as I stated now.

By Mr. NEAL.—I offer this in evidence as Plaintiffs' Exhibit "M." Exhibit "M" reads as follows: Farmington, Washington, Sept. 4th, 1911. Mr. J. M. Leiter, Dear Sir: I received a notice from you to settle some interest on a note given to A. C. Ruby & Co., Portland, signed by me and Henry Stroh. Now, I paid no attention to it as I did not owe the Co. anything. Now, then since then that note has been sent here for the interest which I refused to pay. Now, I just thought I would explain the matter a little to you and you could do as you please. A. C.

(Testimony of Thomas S. Poindexter.)

Ruby's man Watson came here with a horse to sell and offered several men here to help him sell the horse and he would give them one share, the horse to sell at \$2,800 dollars of \$400 per share, so he made the sale of the horse of 6 shares to Henry Stroh and told me that Stroh gave him as security a note and mortgage on a ranch so all the paper that I signed was just the contract and [67] their agreement which was necessary to accept the horse but never signed any note at all. So if he has my name on a note it is forged there by this man Watson or their Co. because I never saw such a note before until it came here for collection. T. S. Poindexter.

Q. Now, Mr. Poindexter, I believe you said that this horse only got five colts during the season.

A. Yes, sir, that is what Stroh said.

Q. How many did you get? A. I got two.

Q. What is your business? A. Farming.

Q. You have quite a number of brood mares, have you not? A. I breed one or two a season.

Q. You understand the English language well, do you not, so far as reading and writing is concerned?

A. Fairly well; yes sir.

Q. I show you a telegram dated January 29, 1912, and marked for identification Exhibit "L" at the former trial, and ask you if you received that telegram from Mr. Ruby. A. I could not say.

Q. Do you recollect receiving it?

A. No, sir, I did not keep them so I do not remember.

(Testimony of Thomas S. Poindexter.)

Q. You did not pay any attention to that kind of a telegram?

A. I did not as I did not have any horse to trade.

By the COURT.—I will sustain the objection to the contract, Exhibit “I,” which I took under advisement. To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. [68]

Redirect Examination by Mr. ORLAND.

Q. Do you know whose handwriting that is,—who filled that blank out, referring to Defendant’s Exhibit “A” the application for insurance?

A. No, sir, I could not identify the writing.

Q. It is not your handwriting? A. No, sir.

Q. Was that insurance policy required by Mr. Watson? A. Yes, sir.

Q. Do you know where you were when you signed that application?

A. No, sir; I could not say for sure.

Q. Did you go with Mr. Watson to sign it or did Mr. Watson bring it to you to sign?

A. I do not remember.

Q. But you know you made the application for insurance as was required? A. Yes, sir.

Q. Where were you when Plaintiffs’ Exhibit “A,” the note in controversy, was signed?

A. In the hotel office in Farmington.

Q. Who is the proprietor of the hotel?

A. W. D. Haines.

Q. Who was present at that time?

A. Mr. Stroh, Haines, Watson, and myself.

(Testimony of Thomas S. Poindexter.)

Further Cross-examination by Mr. NEAL.

Q. I would like to ask you if it is not a fact that you agreed with Mr. Watson that if he would pay the expenses of yourself and Mr. Stroh to Portland, that you and Stroh would go down to Portland and pick out another horse in exchange for the one you had? A. At what time was that?

Q. Sometime, I think, in October or November last year [69] prior to the commencement of this action in 1911. A. In 1911 did you say?

Q. Yes, sir, in 1911.

A. I turned my share over *the* Stroh. I do not remember.

Q. You do not remember that? A. No, sir.

Q. I will ask you further if it is not a fact that you told Watson at that time that if he would deposit in the Bank at Garfield, Washington, the sum of \$40.00 for the purpose of paying your expenses to Portland that you and Stroh would go down and select another stallion?

A. I think we did early in the season.

Q. You remember that you did agree to that?

A. Yes, sir, something to that effect.

Q. And you remember that Watson placed the money in the Bank at Garfield? A. Yes, sir.

Q. And you also remember that the money was transmitted from that bank to the Bank of Farmington for you? A. I think so, yes, sir.

Q. Now, do you remember last November at the trial that you testified at that trial to that which is not now true? In other words, you have changed

(Testimony of Thomas S. Poindexter.)

your testimony in reference to this particular point.

A. I could not say.

Q. Anyway, at this time you admit that was the fact.

A. I think he left the money in the bank early in 1911.

Q. Then you refused to go to Portland?

A. He did not want us to go until after the season was out.

Q. You refused to go?

A. Mr. Stroh went down to Portland with the horse.

Q. At that time? [70]

A. I do not know. I do not know what date that is.

Q. Along about October, 1911.

A. Stroh already had the horse in Portland at that time.

Q. I will ask you if you did not agree with Watson that if he would pay your expenses to Portland and place the money in the Bank of Garfield that the two of you would go down and select another stallion in the place of this one.

A. We might have done so, yes, sir, before that time.

Q. And then when that was done you refused to go?

A. I never went at that time but Stroh did.

Q. You or Stroh never went after that time?

A. Mr. Stroh went down two or three times for that purpose.

Q. Did he ever go to the Ruby barn at any time, if you know? A. I was not there.

(Testimony of Thomas S. Poindexter.)

Q. Anyway, you refused to go?

A. He went down for that purpose.

Q. And you refused to go?

A. I did not have any horse and I did not need to go.

[Testimony of W. D. Haines, for Defendant.]

W. D. HAINES, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your name. A. W. D. Haines.

Q. And where do you reside?

A. Midland Falls, Washington.

Q. Where did you reside during the month of February, in the year 1911?

A. At Farmington, Washington.

Q. What was your business at that time?

A. I was manager of the hotel at Farmington.

Q. Are you acquainted with Mr. Poindexter?

[71] A. Yes, sir.

Q. And with Mr. Watson? A. Yes, sir.

Q. Just state if you saw Watson during the month of February, 1911. A. Yes, sir.

Q. Where did you see him?

A. He came to the hotel, if I remember right, and registered on February 5th.

Q. Did you have any conversation with him with reference to his business?

A. Not directly, but he made inquiry of me as to who the good reliable farmers were around there.

Q. Did he state what he wanted to do?

A. No, sir, but I knew that he had a horse there.

(Testimony of W. D. Haines.)

Q. Did you have any conversation with him with reference to selling the horse, or anything of that kind? A. No, sir, I think not.

Q. Mr. Haines, do you remember on or about February 14th of Watson and Poindexter being in the hotel at the time some instrument was signed?

A. Yes, sir, they was there with an instrument. I do not remember the date.

Q. Who was present at that time?

A. Stroh, Poindexter, Watson and myself.

Q. Was there anyone else present? A. No, sir.

Q. Do you know what kind of an instrument it was that was signed?

A. I heard them talking regarding a contract and my recollection is that Poindexter asked Watson if he had any other style of a contract from the one that he had.

Q. Did you see the instrument?

A. I noticed the heading of it as I was passing by.
[72]

Q. You may look at Plaintiffs' Exhibit "A" and tell us if that is the instrument that you saw lying there.

A. Yes, sir, something similar to that but I did not notice any part more than the heading.

Q. Was there any other conversation between Poindexter and Watson other than what you have detailed?

A. It was just merely in regards to the contract; if there was any other form and he was informed that was the only contract they had.

(Testimony of W. D. Haines.)

Q. Do you know whether there was any writing in that body of that? A. I do not know.

Q. Was that some time after this instrument was signed? By the way, did Poindexter and Stroh sign that there together? A. Yes, sir.

Q. Now, after signing it, did you have any conversation with Watson with reference to the transfer of this stallion?

A. We had several conversations before and afterwards. Mr. Watson asked me a number of times if Poindexter was a responsible man, and he came to me one day and says, "Some one is going to get the horse," and on the day of the sale he says, "I have turned the horse over without a dollar, but I have got good notes with a mortgage," and he also informed me that he had sold a share to Poindexter, and I asked him how he fixed it up with Poindexter and he said that was Stroh's part, that Poindexter paid cash; he did not give me a note.

Q. Poindexter did not give a note?

A. Yes, sir, Poindexter did not give his note.

Q. You have known Mr. Poindexter for some time?

A. Yes, sir, twenty-six years, I should judge.

Q. I believe that you are in some way related?

[73] A. Yes, sir, I am his brother in law.

Q. Is that your reason why you were instrumental in knowing what Poindexter did?

A. Well, in a way, yes, sir. I was interested.

Cross-examination by Mr. NEAL.

Q. Where was Stroh and Poindexter when they signed Plaintiff's Exhibit "A"?

(Testimony of W. D. Haines.)

A. At the writing-table alongside of the wall in the lobby.

Q. And where were you?

A. I was at various places; in back behind the counter sometime, and then over to the stove in front of the writing-table, and I remember going into the washroom, which leads right by the end of the table.

Q. And where was the paper then?

A. The paper was on the table.

Q. Did you see what was on it?

A. On the top was purchasing contract, or something like that.

Q. You do not then know, do you, what was in the paper?

A. I just merely saw that it was a contract.

Q. You testified before in this case?

A. Yes, sir.

Q. And you testified before that you were away that far (indicating from the witness chair to the table) when they signed it? A. Yes, sir.

Q. And you undertake to tell the jury that you could see what was on the head of that paper from that distance?

A. I was passing by and glanced at it several times.

Q. Do you know whether that contract was there at the same time? (Showing witness a paper.)

A. I could not say. [74]

Q. Do you swear positively it is this one or this one? (Showing witness two papers.)

A. Positively this one.

Q. You are a brother in law of Mr. Poindexter's?

(Testimony of W. D. Haines.)

A. Yes, sir.

Q. But you are not able to say whether there was any writing on that when you saw it? A. No, sir.

Q. You passed right by here and saw the purchasing contract and Mr. Poindexter is your brother in law and you watched to see what he signed and you did not see what was on the paper?

A. No, sir, I did not pay much attention.

Q. You saw them both sign it?

A. I saw them both sit up to the table and take the pen in their hands.

Q. That is his signature on those?

A. I saw Poindexter sign it.

Q. Did you see Poindexter and Stroh sign it?

A. Well, yes,—I might say I saw them both sign it.

Q. When was it you had the conversation with Mr. Watson after the paper was signed?

A. It was after the paper was signed.

Q. This paper dated February 14th, is that the time they signed? A. I do not remember.

Q. Did you see them sign this paper?

A. I did not, no, sir.

Q. Did you see him sign that paper, referring to Plaintiff's Exhibit "F"? A. I did not.

Q. Is that Mr. Poindexter's signature?

A. That looks like it. [75]

Q. You know it pretty well, do you not?

A. Well, yes, that looks pretty much like it.

Q. Now, you say you had a conversation with Mr. Watson in reference to the mortgage that Mr. Stroh had given him? A. Yes, sir.

(Testimony of W. D. Haines.)

Q. When was that with reference to the time you saw Mr. Poindexter and Mr. Stroh sign the note?

A. I am not sure, but I think it was after it was signed, when he made the statement to me in regard to Mr. Poindexter paying cash for his share.

Q. You say that you saw Mr. Poindexter sign this note, and then you say that Mr. Poindexter did not give a note.

A. I am sure it was after the papers were signed.

Q. Do you know when the horse was turned over?

A. I do not know, but Mr. Watson left that same afternoon.

Q. Then the conversation with Mr. Watson was on the same afternoon when he left Farmington?

A. Yes, sir.

Q. You do not know the date Mr. Watson left, do you? A. No, sir.

Q. He did not leave Farmington until after he turned the horse over, did he? A. No, sir.

Q. Now, he did not leave until he got this receipt dated February 17th, did he? A. I could not say.

Q. You kept the hotel register at the hotel?

A. Yes, sir.

Q. Did you not testify before that Mr. Watson left on February 17th?

A. I do not know. My hotel register would not show the date he left.

Q. Did you have any record of when he settled his bill? [76] A. No, sir.

Q. You did not testify to that before.

A. No, sir.

(Testimony of W. D. Haines.)

Redirect Examination by Mr. ORLAND.

Q. About what time in the day was it that Plaintiffs' Exhibit "A" was signed in your hotel?

A. I think about one or one-thirty in the afternoon.

Q. How long after the instrument was signed in your office was it that Watson left town?

A. He left on the 3:15 train in the afternoon.

Q. And was not back there again that you know of for some time? A. No, sir.

Q. Was it two or three days after the signing of Exhibit "A" that he left town? A. No, sir.

(Witness excused.)

[Testimony of Henry Stroh, for Defendant.]

HENRY STROH, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

Q. What is your name? A. Henry Stroh.

Q. And where do you reside, Mr. Stroh?

A. In Farmington.

Q. How long have you lived there?

A. Twenty-one years.

Q. What business do you follow?

A. I am a farmer, have been a farmer, and am farming now.

Q. In February 1911, did you have any negotiations or dealings with this man Watson in the house of A. C. Ruby, in regard to the stallion Ithos?

A. Yes, sir.

Q. How did you come to have that dealing with him? [77]

(Testimony of Henry Stroh.)

A. He stopped in Farmington about two weeks to sell that horse.

Q. Did you purchase any of the stock in that horse, of Mr. Watson?

A. No, sir, I got no stock. I bought an interest in him and Poindexter got one.

Q. How much of an interest did you have?

A. I got six shares and Poindexter one.

Q. What arrangements did you make as to paying for?

A. I paid \$2,400 and Poindexter \$400.00 and we made arrangements with him on a note.

Q. In these negotiations or dealings, did you sign any papers? A. Yes, sir.

Q. I now hand you Plaintiffs' Exhibit "A" and ask you to look it over and see if you signed it.

A. Sometime I made a cross. I signed that paper.

Q. Was it in the condition it is now?

A. I never signed a note. I signed a copy of contract.

Q. Was this matter your handwriting?

A. That is my name and I signed a contract and a copy of the contract.

Q. A contract to receive a horse? A. Yes, sir.

Q. And would that be those two papers you signed?

A. Yes, sir, I signed that paper. I got one home like that.

Q. That is all you signed?

A. I signed a contract and a copy of a contract.

Q. Was that note written out and filled up that way? A. I never signed a note.

(Testimony of Henry Stroh.)

Q. Where did you sign this paper?

A. Down in the hotel in the office. I signed them right there.

Q. Who was present?

A. I, Watson, the hotel man and Poindexter. That is all.

Q. The hotel man on the witness-stand just ahead of you? [78] A. Yes, sir.

Q. Was the horse delivered to you that day, you and Mr. Poindexter?

A. Yes, sir, about twelve o'clock.

Q. Did you have any talk with Watson after you left the hotel? A. Yes, sir, I told him—

Q. After,—Have you ever seen this paper?

A. He said, "I got no time; I got to go to Spokane," and I asked him if it was a note, and he said, "When I come from Spokane I fill that note out and I can swear to it all the time."

Q. Now, that was after you signed this paper?

A. My name is on.

Q. Who told you this?

A. Watson, I got—he told me when I signed the paper. We left right after that. We went to Spokane after I signed the note.

Q. How long did you keep the horse in Farmington?

A. I forget when. I keep him there to July 15 and take him to Portland.

Q. What was the condition of that horse?

A. Wind-broken and I could not travel the horse.

Q. Have you handled horses?

(Testimony of Henry Stroh.)

A. Yes, sir, lots of them.

Q. He is no sound horse, is he? A. No, sir.

Q. Did you take the horse back to Portland?

A. Yes, sir, on July 15th, and on the 17th I was in Portland with him.

Q. What did you do with him?

A. I take him down to the barn and notify the company, the Ruby Company.

Q. And what did they do? [79]

A. Watson and the company promised me to exchange the horse and I notify Watson by phone and he said in at eight o'clock, and Watson come in and said, "We go out and look the horses in the barn." He said, "We got some pretty horses."

Q. What did you do then?

A. We jump in an automobile and go out to the ranch.

Q. How far out did you go?

A. About ten miles

Q. And what did you do out there?

A. Looked at the horses.

Q. Did he have any horses?

A. He said they were pretty horses, but they were not for me.

Q. What do you mean—do you mean no horses for the price?

A. No, sir; he got some cripples and some spotted-cayuses out there,—about fifteen colors.

Q. And he wanted you to take one of these in lieu of the \$2,800.00 horse? A. Yes, sir.

Q. Did you take a horse? A. No, sir, I did not.

Q. What did you finally agree to do?

(Testimony of Henry Stroh.)

A. I go back to Portland and sue company for damages.

Q. What became of the horse?

A. I take four men out the next day to the barn and he got no horse for me at all.

Q. What do you mean?

A. He got two year old colts and old horse out there.

Q. Did you offer to give them the horse back?

A. Yes, sir, and take another horse and pay me and go home.

Q. What did you say to Watson in regard to taking the horse back?

A. I say, "I take the horse in your possession and when the company comes in new horses, he notify me and I take another [80] horse," and I put the money in the bank for your horse. He says, "No, you leave the horse in the livery-barn and Ruby says he pay the feed bill."

Q. Did they notify you to come down to Portland and see about it? A. Yes, sir, I go down.

Q. How many times did you go down there?

A. Four times. Watson notified me two and said Ruby got in horses and I go down and he no got the horses. No, sir.

Q. Was Mr. Ruby there?

A. One fellow of the company come in and taken me out to the barn.

Q. But you did not see Mr. Ruby?

A. No, sir, I am a stranger, do not know nobody.

(Testimony of Henry Stroh.)

Q. You offered to put the money in the bank for a horse?

A. Yes, sir; I show Watson a draft for \$2,800.00, all ready, right in front of his mouth.

Q. You offered him that if he would get you a horse such as you bought and take the one you had back?

A. Yes, sir, I offered it to him right in front of his mouth like that.

Q. And he did not do it?

A. No, sir, he did not want to do it.

Q. How many trips did you make to Portland for the purpose of getting another horse in the place of the one you took down there?

A. I make three trips before and I took a trip with Poindexter down there.

Cross-examination.

(By Mr. NEAL.)

Q. Mr. Stroh, you say you signed this contract, Plaintiffs' Exhibit "A"?

A. Yes, sir, that is my name and I can show you a name in my pocket the same way.

Q. You also signed Plaintiffs' Exhibit "G"?
[81]

A. Yes, sir, that is the guaranty. I know the paper but I cannot read English.

Q. You claim you got that? A. Sure.

Q. When did you first learn that this paper was a note?

A. I never signed a note, but I signed a contract and a copy.

(Testimony of Henry Stroh.)

Q. You are positive you never signed a note?

A. I not signed a note. I signed a contract and a copy of a contract.

Q. You want to tell the jury you never signed a note?

A. No, sir; I asked Watson outside on the porch if it was a note when he was going to Spokane, and he said it was a contract and I signed it.

Q. Did you sign a receipt for the horse when the horse was turned over to you by Mr. Watson?

A. No, sir, he never got my receipt as I know.

Q. Is that your signature on Exhibit "F"?

A. Yes, sir, right there.

Q. You signed that?

A. Yes, sir, he bring a whole handful of papers.

Q. Did you sign that?

A. I know I signed two papers.

Q. Did you sign that? A. Yes, sir.

Q. When did Mr. Watson turn the horse over to you?

A. The same day I bought the horse, but I cannot say the date.

Q. And did Mr. Watson leave Farmington the same day? A. Yes, sir.

Q. He left the same day on the afternoon train?

A. Yes, sir, and he was in a hurry to get away.

Q. Did you see Watson around the hotel after that when or while you were staying at the hotel?

A. No, sir, I never been in the hotel, put up at the hotel for [82] twenty-one years, and I can prove it.

(Testimony of Henry Stroh.)

Q. Do you know the man Kerston who signed the paper as a witness?

A. I do not know him but his name is plain on the paper.

Q. You know this man here, Mr. Kerston, do you not? A. Yes, sir.

Q. You came up to the hotel with him when you signed this paper, did you not? A. No, sir.

Q. Mr. Kerston was down to your place, was he not? A. No, sir.

Q. And he came up to the hotel with you?

A. No, sir.

Q. On the same day you received the horse and signed the receipt?

A. No, sir, I never signed that in the hotel.

Q. You think that Kerston witnessed your signature without seeing it written, do you?

A. Kerston never signed that paper before my eyes.

Q. He did not do that? A. No, sir.

Q. When you signed this Exhibit "A" was Poindexter's signature on it?

A. He signed it already, yes.

Q. And Mr. Poindexter had already signed this Exhibit "G" when you signed it?

A. Yes, sir, he signed every time first, the contract and the copy before I signed.

Q. Now, Mr. Stroh, you kept the horse there and stood him during the season in July and then you went down to Portland and took the horse with you?

A. Yes, sir. [83]

(Testimony of Henry Stroh.)

Q. And you called up Watson and told him that you were there with the horse? A. Yes, sir.

Q. And Watson told you to come out to the farm and pick out another stallion? A. Yes, sir.

Q. And you could not find any to suit you?

A. He did not have any good ones.

Q. And so you refused to take one?

A. Yes, sir, I had four men go out with me to look and they did not see any.

Q. And Mr. Watson told you that they would have another shipment in soon and you could have your pick out of that? A. Yes, sir, he told me that.

Q. And later you come back to Portland and made an appointment to meet Mr. Ruby in the hotel?

A. I made an appointment, yes.

Q. And you refused to keep the appointment to meet A. C. Ruby, did you not?

A. Well, I do not know.

Q. You were not there when Mr. Ruby went there at the time you said you would be there?

A. He notified me he would be there.

Q. He notified you that he would meet you at a certain time and place and you were not there. I am trying to find out what Mr. Ruby did. You say you made an appointment to meet Mr. Ruby in Portland in one of the hotels and when Mr. Ruby arrived you were not there, were you? Is that a fact?

A. If Mr. Ruby waited for me at hotel I never knew that.

Q. Did you not just say you had an appointment to meet Mr. Ruby at a hotel? A. I did.

(Testimony of Henry Stroh.)

Q. As a matter of fact, you have refused to take a stallion in [84] the place of the one you had?

A. Yes, sir.

Q. In other words, you wanted to take one three times as valuable as the one you had?

A. You think I wanted to take an old cripple worth nothing?

Q. You know, as a matter of fact, that Watson showed you some first-class horses and told you to take your pick?

A. I took four men out there to see the horses and they were worthless; all that was out there wasn't worth nothing.

Q. And you know, as a matter of fact, that two of those horses took prizes at the Walla Walla fair?

A. I do not know he got a horse at Walla Walla. I like to know what horse he got.

Q. He took them, two of them he showed you, on the first trip to Walla Walla. A. Yes, sir.

Q. Now, I will ask you if, as a matter of fact, that two of the horses took prizes at Walla Walla. The Percheron horses you looked at when you were down to Portland the first time.

A. He got a little gray horse, two years old, and I did not take that because he got five or six colors on him.

Q. In other words, you went down to Portland in July when Mr. Ruby had six or eight or ten horses and none of them satisfied you? A. No, sir.

Q. And you took four men down when he got the

(Testimony of Henry Stroh.)

shipment down there of thirty-seven and you could not find a stallion that was satisfactory to you?

A. I got four men out there to look at them for me.

Q. The second time you did not take any one out when you went? A. No, sir.

Q. When was the second time after the shipment of 37 head come in. You did not even go out to the farm to look at the 37, did you? [85]

A. He got no horses down when I was there the second time.

Q. How do you know? A. I found out.

Q. How did you find out?

A. I asked a man down there and he said they not got any in.

Q. When you were there the third time did he have any in? A. No, sir.

Q. When did you go down the third time?

A. I do not know when.

Q. When did you go down the second time?

A. About a month after the first time.

Q. Was it in August?

A. I do not know what time.

Q. Was you down there in September?

A. I believe so.

Q. When did you go down the third time?

A. I do not remember the date, and I cannot read or write English.

Q. You went down there Mr. Stroh prior to the 25th of September, did you not?

A. I was down there in July and—

Q. Then you come home? A. Yes, sir.

(Testimony of Henry Stroh.)

Q. And then you went down again prior to September 25th, 1911?

A. Yes, sir, he notified me and I come down.

Q. Did Mr. Ruby notify you, after you *had down* there and come home the second time, he wrote you a letter? A. He did, yes.

Q. I show you a letter dated September 25th, 1911, and ask you if that is the letter you received from Mr. Ruby.

A. I wrote him fifty letters to change the horse.

Q. Is that the one you received Mr. Ruby? [86]

A. I could not say, but I received several letters.

Q. I will read the letter to the witness, as he stated he could not read or write English.

Q. Mr. Stroh, how did you manage to read the letters when you received them?

A. I go see somebody to read it.

Q. Did Mr. Ruby ever write you after this time that he was disappointed when you did not keep the appointment made with him?

A. Yes, sir, and he said if I keep the horse one year he would get over the spell.

Q. You say you got a letter with that in?

A. Yes, sir.

Q. Was that along about September?

A. That was the 15th when I wrote the letter to him and I told him he got to come and make that right.

Q. And Mr. Ruby told you that he did not think you had tried to do what was right in the matter?

A. Yes.

(Testimony of Henry Stroh.)

By Mr. NEAL.—I want to get him to identify this letter and he cannot read.

By the COURT.—Let me see the letter and I will permit you to read it to him if material. You may read it to him.

(Letter read to witness.)

Q. Did you receive that letter?

A. No, God bless me, no.

Q. You never received that letter?

A. No. How did you get that letter?

Q. You are sure you never received it, are you?

A. No, sir, not that letter. How did you get that letter? [87] I would like to know that.

Q. I mean, did you receive the letter of which this is a copy, Mr. Stroh?

By the COURT.—Counsel wants to know whether you ever got a letter from Mr. Ruby that read like this one reads.

A. No, sir, Judge, no.

Q. Now, you had an attorney, Mr. T. J. Lutey, once in this matter?

A. What do you mean? Yes, sir.

Q. And when you received the letter which I read to you dated September 25, 1911, you took it over to Mr. Lutey, did you not?

A. He get the letter. I did not get the letter.

Q. I will ask you if you did not deliver a copy of that letter to Mr. Lutey at Farmington, Washington.

A. Yes, sir, I turned over lots of letters to him.

Q. I am asking you if you did not receive a letter of which that is a copy, and if you did not take that

(Testimony of Henry Stroh.)

letter and deliver it to your attorney, T. J. Lutey, at Farmington, Washington.

A. I never heard of a letter like that. I never wrote a letter like that.

Q. Did you not go to see your attorney, T. J. Lutey, on October 7th, 1911 with reference to this matter?

A. I forgot what day. I see him lots of times.

Q. And at that time after September 25, 1911, and up to the 7th of October, did you go to your attorney, T. J. Lutey, and have him answer this letter for you, or the original of which this is a copy? Did you do that?

A. Yes, sir, I go to see him often.

Q. Now, calling your attention to Plaintiffs' Exhibit "B-2" for identification, I will ask you if after the date of this letter, and prior to the 7th of October, or prior to the 8th [88] of October, you did not go to your attorney, T. J. Lutey, at Farmington, with the original of this letter and submit it to your attorney and have him write back in reference to it.

A. Yes, sir, I told him to write to him all the time. I wanted a settlement out of him.

Q. What did you tell him to write about?

A. I told him to write to Ruby if he got a Percheron horse I go and get him.

A. Did you see the letter your attorney wrote?

A. Yes, sir, he read it to me.

Q. Assuming that the letter is dated,—do you know Mr. Lutey's signature?

A. No, sir, all I know was he wrote for the horse, for a settlement.

(Testimony of Henry Stroh.)

Q. I will read this letter——

(Letter marked Plaintiff's Exhibit "B-2" for identification read to witness.)

Q. Is that the letter that Mr. Lutey read to you?

A. Yes, sir, but that is not the letter that Ruby wrote to me.

Q. This is the letter that referred to it. Do you distinguish between the copy and the original?

A. I never got a letter to that effect.

By Mr. NEAL.—I desire to offer the two letters in evidence.

By Mr. BROWN.—I object for the reason that they are immaterial and self-serving.

By Mr. NEAL.—The first one, Plaintiff's Exhibit "B-2," I desire to offer for the purpose of showing that Stroh was offered a horse in exchange; and I offer the other letter for the purpose of showing that Mr. Stroh did receive this letter. [89]

By Mr. BROWN.—I object to the letter purported to be to Mr. Stroh on the ground that it is self-serving, incompetent and immaterial and not proper cross-examination; and the other one as not being identified, incompetent and immaterial.

Objection sustained.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

Q. You said you believed you never signed any note?

A. I signed a contract and a copy of a contract.

Q. Now, you commenced suit in the Circuit Court

(Testimony of Henry Stroh.)

of the State of Oregon, in which you were the plaintiff and H. S. Deardoff, S. K. Watson and Thos. S. Poindexter were defendants, did you not?

A. Yes, sir, I sued Ruby all right for that horse.

Q. And on July 29, 1911, you swore to this complaint as being true before Mr. Renfrew, a notary public at Farmington?

A. I did not know I swear to anything.

Q. The complaint filed in Portland was sent to you for your signature?

A. I never swore in Farmington.

Q. You filed suit in July 1911?

A. Yes, sir.

Q. And at that time you knew you signed a note?

A. No, sir, I signed a contract and a copy.

Q. And your knowledge in reference to you signing a note now is not any better than it was when you signed this complaint. I will withdraw that. Now, when was it you found out the horse was badly wind broken?

A. The next day after I got him. I led him home.

Q. What did you mean in your complaint when you sued A. C. Ruby for damages—I read you this portion of the complaint: “That in truth and in fact the horse was in bad condition for [90] breeding purposes, all of which was unknown to the plaintiff until long after said sale.” How do you reconcile that statement with the testimony just given by you.

A. I led him home the next day after I bought him and he could not go without breathing hard.

Q. How did it come that you made that statement?

(Testimony of Henry Stroh.)

A. I found it out the next day and notified the company the next day.

Q. Then this statement is untrue?

A. No, sir, I found it out the next day.

Q. At the time you filed this complaint,—have you seen this paper since signing it, Exhibit “A”?

A. I never saw it until I came here.

Q. You never saw it until it was shown to you here?

A. No, sir.

Q. Why was it you stated in this complaint that you gave a note for \$2,400.00?

A. I never sued for the note. I sued for the horse.

Q. You sued to cancel the note?

A. No, sir, I sued Ruby against the horse.

By Mr. NEAL.—If the Court please, I desire at this time to offer in evidence a certified copy of the complaint in the case of Henry Stroh versus Thos. S. Poindexter, H. S. Deardorff and A. C. Ruby, in the Circuit Court of the State of Oregon, which is duly certified to by the County Clerk of Multnomah County attached; and I desire to offer that in evidence for the purpose of contradicting the statement of that witness that he never at any time signed a note, and for the purpose of contradicting the witness wherein he stated as to the condition of the horse that he did not discover it until a certain date, and also for the purpose of showing that the [91] witness Stroh knew and considered that this was a negotiable note, and for any other purpose that the instrument might be competent for.

(Testimony of Henry Stroh.)

By Mr. BROWN.—I object to its introduction in evidence upon ground that it is incompetent and immaterial and not proper cross-examination and is not contradictory of the testimony of the witness on the stand, and is not competent by this to show that this defendant knew that this note was negotiable, because he is not a party to this action and it would not be binding upon this defendant Poindexter so far as the note being negotiable or non-negotiable.

By the COURT.—In what respect is it incompetent?

By Mr. BROWN.—To show by this declaration made in the complaint there in Portland that he knew this note was negotiable because he is not a party to this action.

By the COURT.—The first objection will be sustained.

By Mr. BROWN.—Taking the instrument as a whole, it is not contradictory in that, and if he is mistaken in that, as he cannot read, that would not be contradictory as to his testimony here, as he did not know what the attorneys alleged.

By Mr. NEAL.—He was seeking to get \$2,400.00 in damages on account of keeping this horse, arising out of this transaction and stated in there that he gave his note for \$2,400.00.

By the COURT.—I think it will be received as to the testimony on those two points: When he discovered that it was a wind-broken horse, and, when he sued, that it was a note he signed. [92]

By Mr. NEAL.—And further, that he knew of a

(Testimony of Henry Stroh.)

copy of this guaranty being set out in the complaint.

By the COURT.—I think he already has admitted that he received the guaranty.

Q. Mr. Stroh, you did not see Mr. Watson only on two occasions in Portland,—when you were in Portland, how many times did you see Watson on those trips?

A. Each time I was down there.

Q. Did you talk with him each time?

A. Yes, sir, right on the square.

Redirect Examination by Mr. BROWN.

Q. Did you stand that horse during the year 1911?

A. Yes, sir.

Q. How many mares did he serve?

A. Thirty-eight mares.

Q. And how many colts did he get?

By Mr. NEAL.—Object to the question upon the ground that it is incompetent, irrelevant and immaterial, for the reason that the guaranty is in evidence, and the only liability of Ruby & Company is to give another horse.

By the COURT.—Objection overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. He got five live colts and two dead.

(Witness excused.)

[Testimony of G. B. Whitney, for Defendant.]

G. B. WHITNEY, being first duly sworn as a witness on behalf of the defendant, testified as follows: [93]

Direct Examination by Mr. ORLAND.

Q. Give your full name.

A. G. B. Whitney.

Q. And where do you reside?

A. I farm west of Palouse about four miles.

Q. How long have you resided there?

A. Very nearly thirty-one years.

Q. What business are you engaged in?

A. Farming and stock-raising.

Q. Have you handled stallions as a business to some extent?

A. I have been until this year.

Q. Do you know A. C. Ruby?

A. Yes, sir.

Q. Where did you meet him?

A. In Portland.

Q. Have you ever been engaged with Ruby in assisting in selling horses?

A. Yes, sir.

Q. Have you had any conversation with Mr. Ruby with reference to the method of taking papers from persons to whom horses were sold?

A. Yes, sir.

Q. Where was it this conversation took place?

A. At Portland with Mr. Ruby.

Q. And when did it take place?

(Testimony of G. B. Whitney.)

A. That was somewheres about two months from the time these fellows bought the horse.

Q. Before or after that time?

A. Before they bought the horse.

Q. And that conversation was in pursuance of—in this conversation had with Mr. Ruby, was it had in pursuance of employment with him for the sale of horses? A. Yes, sir. [94]

Q. What did he tell you was the method of obtaining paper for the sale of horses? Did he inform you what the general method was of obtaining notes for horses sold to farmers? A. Yes, sir.

Q. You may state what Mr. Ruby told you.

By Mr. NEAL.—I object on the same ground, and for the reason it is not shown it has any reference whatever to the transaction in this case.

By the COURT.—You say, Witness, that Mr. Ruby told you how his agents generally procured notes, under what general conditions; or was it merely telling you what you would do?

A. No, sir, he gave me instructions just as other agents; and I saw the papers that Watson got.

By the COURT.—He simply told you as to what you should do.

A. He gave me general instructions.

By the COURT.—He said nothing about what the other agents do.

A. He said it was the same proposition. My instructions, he just instructed me the same as his other agents.

Q. Did he tell you what he instructed his agents to do?

(Testimony of G. B. Whitney.)

By Mr. NEAL.—I object to the question as leading.

By the COURT.—You ought to understand the question. I asked you whether he told you what you should do, or what the others did.

A. He told me what I should do and he said that was the way the others did.

By the COURT.—I doubt very much, gentlemen, whether this testimony is admissible. The witness does not understand what is wanted of him. [95]

A. He explained the way to me, and he told me the methods of doing business and he told me how to sell the horses and take joint notes.

By the COURT.—And that is all he said?

A. Yes, sir.

Q. Do you know Mr. Watson?

A. Yes, sir.

Q. Do you know the horse Ithos? A. Yes, sir.

Q. Where did you see him?

A. In Portland, in Ruby's barn.

Q. And where else did you see him?

A. The next time I saw him was in the livery-stable in Garfield.

Q. Do you know what the condition of the horse was at that time?

A. Yes, sir, to a certain extent.

Q. What was the condition of the horse?

By Mr. NEAL.—We object, for the reason that it is incompetent and not admissible, it appearing from the evidence in this case that there was a written guaranty given with the horse, and that the only lia-

(Testimony of G. B. Whitney.)

bility incurred by Ruby & Company, in case the horse was not up to the guaranty, was to give another horse in its place and the evidence shows that Ruby was willing to do so at all times and therefore this evidence is immaterial.

By the COURT.—In the light the record now stands, assuming it to be true that the written guaranty was given, it would be incumbent for the defendants to show that the horse failed to comply with the written guaranty.

By Mr. NEAL.—I do not see the materiality when the evidence shows we offered to give them another horse. [96]

By the COURT.—Mr. Stroh's testimony, if true, is to the effect that you were unwilling to make the exchange.

By Mr. NEAL.—I do not see that it should be submitted to the jury when Mr. Poindexter's testimony shows that Mr. Ruby was always willing to give them another horse. Mr. Stroh's testimony shows that he only made one trip to the barn to select another horse and that he never went down to the farm after the shipment of 37 head was received and after he had been notified to come down and take his pick.

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. The horse was badly wind-broken.

Q. What experience have you had in the handling of stallions?

(Testimony of G. B. Whitney.)

A. I have handled them pretty near steady since I was sixteen years old.

Q. And how many stallions have you handled in that time?

A. I suppose fifteen or twenty.

Q. Were you engaged in the breeding of stallions during that time?

A. Yes, sir, to a great extent.

Q. You say that you know Mr. Watson?

A. Yes, sir.

Q. How long have you known him?

A. I have been personally acquainted with Watson ever since I was at Portland.

Q. Now, did you see Watson when he was at Garfield and Farmington along about February, 1912?

A. I saw him when he was in Garfield, but not in Farmington.

Q. Did you have any conversation with him with reference to this stallion Ithos after he was sold to Poindexter and Stroh? [97] A. Yes, sir.

Q. State what that conversation was.

By Mr. NEAL.—I object on the ground that it is incompetent, irrelevant and immaterial.

By the COURT.—Objection overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. I sustained the former objection because it is not shown that the witness had any knowledge as to the effect of breeding defective stallions, as to wind-broken stallions.

By Mr. ORLAND.—I apprehend that the effect of

(Testimony of G. B. Whitney.)

breeding a stallion which is defective would be general.

Q. Just state the conversation you had with Mr. Watson.

A. He told me that he had got rid of the bay horse and said that he had an idea that the horse would beat him back to Portland when the Dutchman finds out what is wrong with him; and he also said that when Ruby put him out that he did not care to have him taken across the Idaho State line because the State would prosecute him, but he could sell it to Idaho fellows. He stated to me that the horse was wind-broken and had no value about him.

Q. Do you *what* the effect of breeding of a wind-broken stallion has upon the colts that he gets?

A. Yes, sir.

Q. Now, you may state what the effect of breeding a wind-broken stallion is with regard to the colts he gets.

Cross-examination by Mr. NEAL.

Q. Did you ever stand any stallion that was wind-broken?

A. I bred to one with a bunch of good strong mares. [98]

Q. Where was that?

A. Close to Palouse City.

Q. Who owned the stallion?

A. My father.

Q. And when was that?

A. Three or four years ago.

Q. Where did you get the stallion?

(Testimony of G. B. Whitney.)

A. Raised it.

Q. Did you get any colts?

A. Yes, sir.

Q. And what was the matter with them?

A. They were thick-winded.

Q. Was that the fault of the stallion?

A. Yes, sir.

Q. How about the mares' condition?

A. They were as sound as a dollar.

Redirect Examination.

Q. And what is the effect of breeding to wind-broken stallions, with reference to their get?

A. A good many of the colts will be thick-winded and when you work them they are no good.

Recross-examination by Mr. NEAL.

Q. You had some trouble with Mr. Ruby, did you not? A. No, sir, not me.

Q. What was that?

A. No, sir, not me. The company I was in had some trouble with him.

Q. He had trouble with you, did he not?

A. No, sir, none whatever.

Q. Did you go out and sell any horses for him?

A. No, sir.

Q. You said you worked for him, did you not?

A. No, sir, he was bargaining for me to go to work. [99]

Q. You tried to get a position selling horses?

A. No, sir, but he wanted me to sell for him. He wanted me to take three horses back with me.

Q. Tell the jury what was the occasion that Mr.

(Testimony of G. B. Whitney.)

Ruby was giving you so many instructions about his business.

By the COURT.—That was ruled out.

Q. You say you had a conversation with Mr. Watson after he had sold this horse? A. Yes, sir.

Q. When was that?

A. I think that was in Palouse.

Q. Do you know when it was?

A. I think—I talked with Mr. Watson at Garfield and Palouse.

Q. When was it you had the conversation you had testified about here?

A. In Palouse, I think

Q. When was that?

A. Not longer than four or five days after.

Q. When was it?

A. In the winter-time.

Q. When, with reference to this sale?

A. I think it was four or five days after the sale. It was right close after the sale. I never kept no track of the dates.

Q. Now, you say that Mr. Watson told you he expected that the horse would be back to Portland before he got there? A. Yes, sir.

Q. And he told you that at Palouse?

A. At Palouse or Garfield.

Q. And that was four or five days after the sale?

A. It was within two weeks of that time. It was right along there. [100]

Q. Are you sure it was within six months of the time? A. Yes, sir.

(Testimony of G. B. Whitney.)

Q. You say you have handled fifteen or twenty stallions? A. Yes, sir.

Q. Where did you handle all of those?

A. In Willamette, Dayton and Walla Walla.

Q. What was the name of the first one?

A. His name was Jolly.

Q. And where was that you handled him?

A. My father had him at Palouse.

Q. And when did you handle him?

A. When I was a kid I bred him.

Q. How old were you?

A. From twelve to fourteen years old.

Q. You commenced breeding stallions when you were fourteen years old?

A. Yes, sir, around there.

Q. And what was the next stallion you handled?

A. A stallion by the name of Sam. That was Stephens' horse.

Q. And where does Stephens live?

A. In Palouse.

Q. Did Mr. Stephens employ you to breed him?

A. No, sir, my father brought him to the place to breed.

Q. You did not breed him then?

A. Yes, sir, I did.

Q. Is that all you remember—just the two?

A. I think Severs owned the next one. No, sir, between Dayton and Walla Walla was the next one.

Q. And what stallion was that?

A. He belonged to a farmer by the name of Andrew Evans.

(Testimony of G. B. Whitney.)

Q. Was you employed to stand that stallion?

A. I worked him and bred him.

Q. Was he registered? [101]

A. Yes, sir, I think so, and he was seventeen or eighteen hands high.

Q. That is three. What is the next one you were breeding?

A. Some horse around the place there, a young horse; and the next one was when I commenced paying more attention to horses, Mr. Severs owned it.

Q. What was the name of that horse?

A. His name was Capt.

Q. Was he supposed to be registered?

A. Yes, sir.

Q. And imported? A. No, sir.

Q. Did you stand that horse?

A. I kept the horse and bred him for two months.

Q. How many horses did you breed him to?

A. To six or seven of our own and some outsiders.

Q. And what was the next stallion you stood?

A. I do not remember. At that time we had several horses around there.

Q. I do not want to know what we did, but what you did. A. We were all together on the ranch.

Q. You testified that you had a great deal of experience. Now, what is the next one?

A. When I started to do a big business with stallions, Colonel was the next one.

Q. And where did you stand him?

A. At Palouse.

Q. Did your father own the horse and raise him?

(Testimony of G. B. Whitney.)

A. Yes, sir.

Q. What was the other horses you and your brother stood?

A. The next one we had was by the name of Eagle Bird.

Q. You owned that horse?

A. I and my brother. [102]

Q. When was that?

A. I do not remember, but we owned three of them together, and then I owned a horse all alone at the last.

Q. About when was that?

A. I do not remember, but it was the fifth or sixth or seventh horse.

Q. Just name the other stallions.

A. There was a sorrel horse that I was taking care of for Ruby.

Q. When was that? A. About two years ago.

Q. Did you say you took care of him for Ruby?

A. No, sir, it was a Ruby horse.

Q. Can you name any other stallion?

A. I took care of and bred a horse for Mr. Elden.

Q. Do you mean that you bred him to your own mares? A. Yes, sir, and a few outside mares.

Q. Did you,—who stood the horse generally?

A. The fellow's name was Mack.

Q. Did you have entire charge of the horse?

A. They left the horse there at times for breeding and I took care of him for four years.

Q. All of those left there were for to breed your own mares and then they took them away?

(Testimony of G. B. Whitney.)

A. That is all, mostly, but I have taken care of young stallions every year.

Q. Most of the stallions were ordinary common horses? A. Yes, sir.

Q. You know, as a matter of fact, from long experience that the ordinary horse is liable to produce very inferior colts, do you not? A. No, sir.

Q. You do not know that? A. No, sir.

(Witness excused.) [103]

[Testimony of S. L. Stewart, for Defendant.]

Mr. S. L. STEWART, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your full name.

A. S. L. Stewart.

Q. Where do you reside?

A. Farmington, Washington.

Q. How long have you resided there?

A. In town about twelve years.

Q. Are you acquainted with Mr. Poindexter?

A. Yes, sir.

Q. Where were you in the month of February, 1911.

A. In Farmington, Washington.

Q. What business were you engaged in that time?

A. At that time I was not engaged in any business.

Q. Do you know anything about a horse or stallion being brought there by Mr. Watson?

A. Yes, sir.

(Testimony of S. L. Stewart.)

Q. Are you acquainted with that stallion?

A. Yes, sir.

Q. Were you there at the stables a considerable time during the time the horse was there?

A. Yes, sir.

Q. What were you doing?

A. The stable is right between my house and the business part of town, and I had to pass there often.

Q. You did not have a stallion there at that time?

A. No, sir.

Q. Did you have occasion to examine the Watson stallion? A. No, sir.

Q. Did you see the horse?

A. Yes, sir; several times.

Q. Do you know what the condition of that horse was along [104] about that time and later?

A. Yes, sir.

Q. State what that condition was.

By Mr. NEAL.—I object to that on the same ground as the other.

By the COURT.—Overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. When I first saw him, he seemed to have a cold or thick wind or something of that sort; at any rate, I would not pronounce his wind sound as he was breathing heavily and loud.

Q. Did you see him later?

A. In April, about the last, I took a stallion to stand there in town, and Mr. Stroth stood in the next

(Testimony of S. L. Stewart.)

stall, and from that on I was with the horse most every day.

Q. What was the condition of the horse at that time?

A. I thought he was badly wind-broken. I saw Stroh exercising him there.

Q. What condition was he in with reference to serving mares, as to his physical condition and ability?

A. I did not think it was good at all.

Q. In what respect was it not good?

Q. You may state if you are accustomed to handling stallions.

A. Yes, sir; I have had a good deal of experience.

Q. How long—how many years?

A. I guess it is thirty years since I first commenced to handle them, and I have handled them off and on most of the time since.

Q. How many stallions have you handled?

A. I could not say. [105]

Q. Are you handling them now?

A. Yes, sir; I have handled one horse for six seasons.

Q. You may state the ability of this horse to serve mares.

A. He was badly wind-broken and hardly fit to exercise. He could not get his breath, and would almost choke down at times.

Q. How about moving him from one place to another?

A. I never moved him, but I would not like to do it.

(Testimony of S. L. Stewart.)

He was not able to go from one place to another and do the horse justice.

Cross-examination.

(By Mr. NEAL.)

Q. Did he act like a horse that might have had the distemper? A. Yes, sir; he did.

Q. You say there was something the matter with his breathing? A. Yes, sir.

(Witness excused.)

[Testimony of A. R. Knight, for Defendant.]

A. R. KNIGHT, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your name.

A. My name is A. R. Knight.

Q. And where do you reside, Mr. Knight?

A. At Farmington, Washington.

Q. How long have you lived there?

A. For the past seventeen years.

Q. Are you acquainted with Mr. Poindexter?

A. Yes, sir.

Q. Do you know Mr. Watson? A. Yes, sir.

Q. Where were you during the winter and early spring of [106] the year 1911?

A. I was on a farm close to Farmington, about three miles east of Farmington.

Q. Are you a farmer? A. Yes, sir.

Q. Are you accustomed to handling stallions?

A. Yes, sir.

Q. How many years' experience have you?

(Testimony of A. R. Knight.)

A. Since I was ten years old. My father was a big stockman when I was a kid.

Q. And you have been engaged more or less in handling them ever since?

A. Yes, sir; up until the last few years.

Q. Do you know the stallion Ithos, the horse sold by Mr. Watson and the Ruby Company to Mr. Stroh?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in the livery-barn in Farmington.

Q. And have you seen the horse since that time?

A. Yes, sir; I bred some mares to the horse.

Q. State what his physical condition was, with reference to breeding mares.

By Mr. NEAL.—I object for the reason that there was a written guaranty delivered with the horse and Ruby has at all times been willing to exchange the horse; and for the further reason that the witness is not qualified to testify.

By the COURT.—Overruled.

To which ruling of the court plaintiffs then and there excepted, and which exception was duly allowed.

Q. State what his physical condition was. [107]

A. He was thick-winded or broken-winded. I know he could not breed good.

Q. Did you ever see the horse moved?

A. Yes, sir; he brought it out to my place.

Q. What was the condition of the horse at that time?

A. He was pretty near down and out when he got there.

(Testimony of A. R. Knight.)

Q. And how far from town was that?

A. About three miles.

Q. How many mares did you breed to the horse?

A. I bred two mares.

Q. Did you get any colts? A. No, sir.

Cross-examination.

Q. Have you bred those mares since then?

A. Yes, sir.

Q. How many times was the mares returned to the horse during the season?

A. I could not say, but I bred them. The season started in the spring.

Q. You do not know how many times?

A. No, sir.

Q. You are in a partnership with Mr. Poindexter, are you not?

A. Yes, sir; in a threshing-machine.

Q. And have been for a number of years?

A. Yes, sir.

Q. Did Mr. Poindexter try to get you to buy a share in this horse?

A. He asked me if I did not want to buy a share, and he showed me the horse.

Q. When was that?

A. Directly after the horse was brought to Farmington, but I do not remember the dates. [108]

Q. Mr. Knight, do you remember being down to the washroom of the Moscow Hotel on Wednesday afternoon, or in the evening, I think it was, of this week, engaged in a conversation with Mr. Kerstone?

A. Yes, sir; I remember being down there.

(Testimony of A. R. Knight.)

Q. You remember that, do you?

Q. You remember of having a conversation with him, do you? A. No, sir; I did not.

Q. Do you remember standing just to the right of the doorway, in the corners, the two of you, talking? A. Really, I do not.

Q. You do not remember that?

A. No, sir; I said I did not.

Q. You remember talking to him about having received some \$25.00 for something?

A. Not in there.

Q. You did not say anything to him about that?

A. No, sir.

(Witness excused.)

By Mr. ORLAND.—This is our case.

Plaintiffs' Rebuttal Evidence.

[Testimony of S. K. Watson, for Plaintiffs
(Recalled).]

S. K. WATSON, being recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. You heard the testimony of Mr. Poindexter and Mr. Stroh? A. Yes, sir.

Q. In reference to signing of Plaintiffs' Exhibits "A" and "G," I wish you would just tell the jury how the circumstances of your sale of the stallion to Poindexter and Stroh came about.

A. In February, 1911, I moved this horse first to Garfield [109] from Portland, and *I taken* him from Garfield over the wagon road to Farmington;

(Testimony of S. K. Watson.)

and, as near as I recollect, the horse was landed in Farmington on February 5th; and, if I remember right, I arrived that day or the next day, I am not positive, but I think I got there the same night that the horse did,—and I stopped at the Hotel Farmington with Mr. Haines, and was there some little time. I went there for the purpose of organizing a company and selling this horse to a number of the farmers and horsemen of that country. After I was there, I do not remember how long, but I presume a day or such a matter, I was talking with Mr. Haines in regard to the farmers around that country and if he knew anyone interested in breeding better horses and had taken an interest along that line, and he talked awhile and said that Poindexter was a man who had good horses and mares and had been breeding to improve his stock, and that Poindexter would be a desirable man to get acquainted with along that line, and I was there, I think, a day or two before I met Mr. Poindexter, and, if I remember right, he brought his children in to school and came to the hotel and Haines introduced me to Poindexter, and Mr. Haines remarked in the conversation that I had a fine horse there for sale, and I began talking to Mr. Poindexter in regard to the stallion. He asked me what breed it was, and I told him it was a Percheron, and he said that he was not interested in buying a horse himself, but would like to see a horse like that in the country. We talked awhile, and, if I remember right, he went down to the barn with me, and the snow was about a foot deep, and I showed the horse out in front of the

(Testimony of S. K. Watson.)

livery-stable and Mr. Sullivan was there, and I am not sure, but I think, Mr. Knight was there at the time, but I am not positive, although I [110] think it was the first day that Poindexter saw the stallion, he said he was not interested in buying a horse himself; that they had a Shire there before and that for five years he had got some good colts, but that he was a Shire man; he was a Percheron man and not a Shire. And he went home, and I do not just remember whether he came back the next day or not, but I know that I saw him before very long after that and he came back and we talked about the horse again, the second time, and I insisted on him helping me to sell the horse, and he said he did not know whether he could or not, and we talked along for awhile, and, if I remember right, I did not put up the proposition in regard to terms of selling the horse until the next day, or the next time I saw Poindexter, but either then or later I told him what I wanted to do. I told him I wanted \$2,800.00 for the horse, and wanted to get seven men in it at \$400 a share and he asked me the terms and in regard to the guaranty, and I told him, and if this was the date I made the proposition, I would give him \$400 in it. I says, "I will tell you what I will do. You are acquainted with the farmers, and if you select six other men to buy a share in the horse, I will give you one share," and he asked me in regard to the note, and I told him it was a joint note, and he did not object to it, and he went away and told me that he would come back the next day, and I says, "If you will take up this proposition, we will

(Testimony of S. K. Watson.)

see what we can do," and I think it was, perhaps, the next day that he came in and I fixed up the note, the guaranty, and I made out a certificate of stock for \$400.00 and when I presented the \$2,800.00 note for him to sign, he took it up in his hands and started to sign the note, and he kind of laughed and says, "If I sign this note, *Wilson*, you can get on the train and hold me for the [111] whole thing," and I told him, "I would give him a bill of sale, and if this sale goes through, I will give you \$400.00 on the note and give you a share of stock." I explained to him that the \$400.00 would be endorsed on the note if the deal goes through and he says, "I guess I would not take any chance, and I agreed to give him back the note and told him that if I did not get up the stock that I would give him the note back, and at that time I never knew the name of such a person as *Stroh*. This was on February 14th, and I do not think I met *Stroh* until the morning of the 16th of February, and he was working, if I remember right, in the house across from the barn. When I met him he told me he had seen the horse on several occasions, and that he had just sold his property at *Winona* and would not mind having a horse himself, as he preferred that kind of a horse, and he asked me, "If I buy this horse or stock, will you take a note and farm mortgage?" and I stood and talked to him, and he told me that if I would give him the difference between the price of the horse and the note and mortgage for \$6,000.00, that he would buy the horse, and I told him no, and I explained to him that *Mr. Poindexter* had taken one

(Testimony of S. K. Watson.)

share and figured on getting six more men in the company, and he said he would not mind to buy the remainder of the stock himself, and so Mr. Poindexter came in that morning, if I remember right, and I told him about Mr. Stroh and asked him if he knew Stroh and asked about the note and mortgage, and he asked me where the note and mortgage was, and I told him that Stroh said it was in the Bank of Winona, and Mr. Poindexter says, "I will find out; I will go over to the Bank of Farmington and have my banker phone," and when he started out, he said that he did not have any change with him, and I gave him a \$20 bill to pay for the 'phone call, and the Bank of Farmington 'phoned down there and Mr. Poindexter came back and said that the Bank of Winona says he has it there, and he gave me \$19.75 back, and told me to let [112] Mr. Stroh have the balance of the stock as "We need the horse in the country," and while we were around there Mr. Knight was one of the men he tried to sell part of this horse to, and Mr. Poindexter wanted to know of me if the horse was not a little thick of his wind, and I told him that he had had the distemper and had not quite recovered, but that he would get over it in a short time, I thought. I moved him from Garfield to Farmington, and showed him on the streets, and took him to the scales and weighed him. He was a two year old and weighed 1970 pounds, and we did not consider there was a defect in the horse. We all know that it is hard to get a stallion absolutely sound in wind, and we did not consider that anything at all, and I told Poin-

(Testimony of S. K. Watson.)

dexter that if he did not show up all right on his wind, that there was a special guaranty on this horse, and he could change him; I told Mr. Poindexter that if this horse did not give satisfaction in every way that they could return him, and Ruby's stenographer wrote in the contract that if this horse did not get 60 per cent of the mares—I told him if this horse did not give satisfaction in every way that they could return the horse. I told him in case the horse's wind, if it did not come out satisfactory, that the guaranty was back of it, and they could bring the horse back and get another one at any time; and then when Mr. Poindexter told me that Stroh, if he wanted the horse, to let him have it all, or if I could not sell him the balance of it, and I told him that I could not take the mortgage, as I did not have any authority to pay out money, and Mr. Poindexter made the remark to let him have the balance of the horse, and that night, on the 16th, the day before I left Farmington, Mr. Stroh came to the hotel after supper and we talked awhile, and we went up in the parlor and signed this note, and he asked me about the terms, and Mr. Kerston was with him, and they went up into the [113] parlor at the hotel. I have been under the impression that Kerston went with us, and Stroh asked me all about the terms of this note he was signing, and I told him what it was and he signed the note and accepted of the bill of guaranty at that time.

Q. Did you say the guaranty?

A. You refer,—I mean the bill of sale, Exhibit "G." He signed this note and Mr. Poindexter had

(Testimony of S. K. Watson.)

already signed it prior to that and Stroh signed that at the same time.

Q. Had Mr. Poindexter previously signed the guaranty?

A. Yes, sir, when he signed the note; and the next morning Poindexter came in and I said, "Stroh was over to the hotel last night and took the balance of the stock," and Poindexter said it was all right, and Stroh still worked over across the street, and I made out the receipt and Mr. Poindexter signed it.

Q. You refer to Plaintiffs' Exhibit "F"?

A. Yes, sir; on February 17th, the day I turned the horse over and left Farmington, and I wrote the receipt out and Mr. Poindexter signed it and I wrote up the application for insurance and Mr. Poindexter paid one-seventh of that.

Q. The application for insurance is marked Plaintiffs' Exhibit "A-2"; is what you refer to.

A. Yes, sir; and Mr. Poindexter signed it and paid me to the best of my knowledge on the Farmington Bank by a small check, I think it was. He paid me, anyway, and he had a certificate of stock for \$400.00, paid in full and he,—and I took Exhibit "A" and wrote on it "Paid by Thos. S. Poindexter \$400.00"; it was endorsed in his presence, and he wanted to know if it was on there and I showed him that it was and he took a receipt. That was the same time that the receipt and application were written up. [114] After we went downstairs Stroh and Kerston came in. They had been to dinner together and after dinner Stroh and Kerston and myself went up into the

(Testimony of S. K. Watson.)

parlor, and Stroh first signed the receipt for the horse and H. W. Kerston signed it as a witness to Stroh's signature on this receipt, and I said to Stroh that Poindexter paid his part of the insurance, and he wanted to know what his part of the insurance was, and I told him and he went over to the bank and was gone a few minutes and came back and said the bank wanted 12 per cent interest, and he wanted to know if he could not give me a note for sixty days payable to the insurance company, and I told him he could. I wrote up the note for his part of the insurance and he signed it and I mailed it that day.

Q. You heard the testimony of the hotel man, Mr. Haines? Yes, sir.

Q. Wherein he testified that he saw Stroh and Poindexter sign that written instrument marked Plaintiffs' Exhibit "A" on the table in the hotel, both at the same time?

A. No, sir; Haines did not see Stroh sign his name and Stroh did not see Poindexter sign his name. They signed the note, application and bill of sale when Stroh was not present when Poindexter signed, and Poindexter did the same thing when Stroh was not present.

Q. You heard the testimony of Poindexter that when he signed Plaintiffs' Exhibit "A" that none of the portion thereof which is in writing was in the note. What are the facts about that?

A. The note was just in the condition it is now. It was written up and Poindexter read it over and hesitated on signing it as it was a note for \$2,800.00, and

(Testimony of S. K. Watson.)

he knew at that time that all the parties were satisfactory [115] to him would all sign it, and he knew at that time it was no receipt for the horse because at that time I had not sold the horse. It was preliminary and the first steps towards selling the horse, this Exhibit "A," in the sale.

Q. When Mr. Poindexter signed Exhibit "A" was anyone else present besides yourself?

A. Mr. Sullivan just came in from the barn and was present, and it was at meal time and Haines was waiting on the table and was back and forth in the office after we came in there, but I do not believe, I could not say—I could not say positive in regard to Haines being in there at that time.

Q. Where in the hotel did Mr. Poindexter sign Exhibit "A"?

A. On the showcase right this side of the counter.

Q. And where was the showcase?

A. In the hotel office.

Q. Where is the parlor you spoke about?

A. The parlor is upstairs on the second floor.

Q. What was the condition of the weather at the time you moved the horse from Garfield to Farmington?

A. On this particular day the snow was pretty deep.

Q. How far is it between those places?

A. Eight or nine miles.

Q. Did you take the horse over?

A. No, sir, Sullivan and the liveryman at Garfield did.

(Testimony of S. K. Watson.)

Q. Do you remember the circumstances of Henry Stroh coming to Portland sometime in July and bringing that horse?

A. Yes, sir.

Q. Tell the jury what took place.

A. The first I knew was that Stroh had the horse in the livery-barn. Mr. Ruby was in Europe and I was at home, and Mr. Stroh called me up some time in the morning and told me he had brought the horse back to exchange and [116] I made arrangements to meet Stroh at the barn where he told me this horse was.

Q. Where was the horse?

A. In a man's barn by the name of Walker. I got an automobile and Stroh went out with me to Ruby's farm about ten miles east on the base line, and Stroh went out there for the purpose of seeing about getting another horse, and I told him he could have any there, and he looked them over and did not see that we did have a horse the equal of this horse, and I told him that was up to him. We offered anything we had and we had some good horses on hand. We had six head of Percherons ranging from two to five years old and ranging from 1600 to 2,000 pounds, and I told him we would give him the same guaranty with any of them, but he insisted we did not have anything to suit him, but insisted that we take this horse; and when I saw that we could not satisfy him on a horse, I told him we would have a new importation soon and on the arrival of those horses that we would notify him to come and get one and he could have any on hand. He

(Testimony of S. K. Watson.)

said he would leave his horse in the barn. I would not accept the horse he had then as Ruby's representative, and so I went back home and Mr. Stroh,—I went back with Mr. Stroh to the barn and called Walker out as a witness and told him that we could not satisfy Mr. Stroh in exchange, but on the arrival of the shipment from Europe we would notify Stroh and he could have any horse that we had, and I did not see Stroh afterwards. He did not call me up but Judge Day, his attorney—

Q. Did you get in the importation of horses?

A. Yes, sir.

Q. How many head? Do you know?

A. Somewheres between thirty and forty. [117]

Q. And did you notify Mr. Stroh that they were in? A. Yes, sir.

Q. Did he come down afterwards, to Portland?

A. I never saw him down there but I understand that he came. I saw him on one occasion after that.

Q. On that occasion state to the jury whether or not you made an appointment with Mr. Stroh to meet Mr. Ruby with reference to an exchange.

A. The time I met him,—after that he called me up and told me to get him a meeting with Mr. Ruby and I made an appointment for ten o'clock the next morning at the Imperial Hotel, and I told Mr. Ruby about it and he said he would meet Stroh at the appointed hour, and I met Stroh before I got to the hotel the next morning, and I was going up in the Chamber of Commerce and Stroh was on the ground floor, and I told him I was just going up to the hotel,

(Testimony of S. K. Watson.)

and when he come to the floor that Judge Day's office was on, he got off and I went on up to the hotel and I never saw him after that. I came back and went up to the hotel with Mr. Ruby and Stroh did not show up, he never did go out to see Ruby.

Q. Was Mr. Stroh out to the farm after the first time to see the horses?

A. I understood he was out there.

Q. Was that the time he came to town first with the stallion?

A. I think he was down the next day and took four men out with him.

Q. That was before you got the importation in?

A. Yes, sir; that was the first time he was there.

Q. Now, these horses which you showed Stroh and which he refused to accept, I will ask you to state if any of those stallions were shown at the Walla Walla fair.

A. Yes, sir, I showed two of them there myself. [118]

Q. What is the fact as to their carrying off any prizes?

A. I showed two of the horses at the Walla Walla fair. One of them won one first blue ribbon against sixteen horses and was entered in the grand champion and won the grand cup for all stallions of any age or breed and was sold to a bunch of farmers three weeks afterwards, a bunch of ten men for \$3,000.00.

Q. Now, you heard Mr. Stroh tell that he came down to Portland with a certified check for \$2,800.00?

A. He did not owe but \$2,400.00.

(Testimony of S. K. Watson.)

Q. Did he say anything to you about a \$2,800.00 check?

A. No, sir, I would sure have accepted it if he had.

Q. I believe he said a draft rather than a check. Did you see any draft for \$2,800.00?

A. I did not see no money at all.

Q. Do you know the witness, G. B. Whitney?

A. Yes, sir.

Q. Did he ever work for A. C. Ruby?

A. Not to my knowledge, no, sir.

Q. You heard his testimony with reference to a conversation claimed to have had with you down at Garfield or Palouse within two weeks after the sale of this stallion to Stroh and Poindexter in which he said you told him you expected that the horse would be in Portland before you got back there?

A. Yes, sir I heard it, but it is not true.

Q. You heard his testimony about you did not dare to bring the horse in Idaho to sell?

A. No, sir; it is not true because you could not enter no horse in Idaho without a veterinary's inspection, sound or unsound, and I would have no object in telling him that. [119]

Cross-examination by Mr. ORLAND.

Q. When did you say that Mr. Poindexter signed Plaintiffs' Exhibit "A," this note?

A. He signed it according to the date of this paper on February 14th.

Q. You say he signed it the day that the paper is dated?

A. I think they—that he did unless there was some

(Testimony of S. K. Watson.)

mistake in making the date of the paper.

Q. You do not know that is correct?

A. Of course, I am pretty positive as to the date.

Q. You say that Poindexter signed that note for \$2,800.00, and gave it to you?

A. I wrote the note up and Mr. Poindexter signed it and gave it to me.

Q. And you carried it around in your pocket, did you? A. Yes, sir.

Q. How long had you known Poindexter?

A. Not very long, but of course I had heard Mr. Poindexter's name mentioned because he was an old resident and I was myself.

Q. You knew him, did you? A. No, sir.

Q. You say he gave the note to you and you carried it around in your pocket three or four days before the deal and the note was finally consummated?

A. Yes, sir.

Q. And that is represented by a certificate of stock for \$400.00? A. Yes, sir.

Q. He did not owe anything, did he?

A. No, sir, only he was obligated to sign the note and help get the company together.

Q. He did not owe Ruby Company anything? [120]

A. No, sir.

Q. He signed the note and let you have it in your pocket? A. Yes, sir, to show to others.

Q. Did he not know that Stroh signed it?

A. No, sir, only that his signature is on here.

Q. But you saw Stroh sign it?

(Testimony of S. K. Watson.)

A. Yes, sir, I did.

Q. You say you had a conversation with Mr. Stroh in which he told you he had some negotiable papers at the bank of Winona?

A. Yes, sir, and he wanted to trade me.

Q. You made no investigation of those?

A. No, sir, I told Mr. Poindexter and he said that he could find out by going over to the Bank.

Q. What interest was it to Poindexter to find out?

A. Mr. Stroh was taking an interest in the horse.

Q. Could you take the mortgage?

A. I could not, as I had no authority to pay out cash and I would have had to pay him \$3,600.00, difference.

Q. You say you gave Mr. Poindexter a \$20.00 bill to telephone. Did it cost that?

A. He gave me \$19.75 back and told me that the Bank of Farmington had ascertained that Stroh's mortgage and note was in the Bank of Winona.

Q. Did you think that Poindexter could not get \$.25 to pay for the telephone at the time at the bank?

A. No, sir, I did not think that at all.

Q. Now, you say that Sullivan was present when Poindexter signed that note? A. Yes, sir.

Q. Why did you not mention that before at the other trial?

A. I think maybe I did say something about other parties being there, but taking that long a time away and it was hard to remember. [121]

Q. You have discovered that since the last trial?

A. I do not know about that, but I knew that there

(Testimony of S. K. Watson.)

were others in the room.

Q. You are in the employ of A. C. Ruby?

A. Yes, sir, I sell a good many of his horses.

Q. You have been in his employ ever since this deal with Poindexter and Stroh, have you not?

A. There have been times I have not. I am a farmer myself and run that.

Q. How long before that had you been working for Ruby? A. Off and on for six years.

Q. Is Sullivan an employee of A. C. Ruby?

A. No, sir.

Q. He was there at that time with the horse?

A. Yes, sir, he worked for me.

Q. He did not work for Ruby?

A. He was in my employ.

Q. Is he now? A. Yes, sir.

Q. And has been ever since this sale?

A. Yes, sir.

Q. And for how long before?

A. He has worked for me for four years.

Q. When you talked with Poindexter with reference to Stroh taking an interest in the horse he told you to let him have it all?

A. And I told him I could not take the mortgage because I could not give him the difference between the mortgage and price of his share in cash.

Q. He told you that he did not want any interest in the horse, did he not?

A. He always wanted an interest in it.

Q. You gave him that before you saw Stroh?

A. Yes, sir. [122]

(Testimony of S. K. Watson.)

Q. But after you saw Stroh did he not tell you to let Stroh have it all?

A. Yes, sir, I think he said something about that.

Q. Did not Poindexter tell you when you spoke to him about Stroh that he did not know anything about him financially?

A. He said he knew the land.

Q. And you told him that Stroh said he had the papers or mortgage in the Winona Bank?

A. Yes, sir; and Poindexter told me that he would go and telephone, and he took 25¢ out of my money to pay the telephone charge, and I think he did or had the bank or somebody telephone.

Redirect Examination by Mr. NEAL.

Q. I think you testified that the consideration for turning over to Poindexter that certificate of stock for one share paid up was the consideration for his signing the joint note?

A. Yes, sir; in order to consummate the sale and get the \$400.00 worth of stock.

Q. What did you tell him as to his signing the joint note?

A. I told him it was a joint note when he signed it, and he hesitated on signing it because he said he could be held for the whole note.

Recross-examination by Mr. ORLAND.

Q. Do you know what became of the horse?

A. Not from my own knowledge, but I understood he was sold in Portland for the feed bill.

Q. Mr. Stroh never shipped him back?

(Testimony of S. K. Watson.)

A. No, sir, he was sold in Portland for his feed bill.

(Witness excused.) [123]

[Testimony of H. W. Keston, for Plaintiffs.]

H. W. KESTON, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. State your name. A. H. W. Keston.

Q. What is your business or occupation?

A. I am farming.

Q. Where were you residing in February, 1911?

A. I was at Tekoa, Washington.

Q. And at that time were you acquainted with Henry Stroh? A. Yes, sir.

Q. Do you remember of meeting Henry Stroh at the time in the hotel in Farmington?

A. I wanted to go to Colfax and I came to Farmington and met Henry Stroh on the street, and he told me he intended to buy a stallion, and I went up to the stable and looked at it, and I saw Watson there.

Q. Did you ever see Watson before that time?

A. No, sir.

Q. Then what did Mr. Stroh do?

A. I—two days afterwards when I first met him, I wanted to go out of town again and I met Stroh and he says, "I want to buy the horse now. My wife is all right now."

Q. His wife was satisfied then?

A. Yes, sir, and we went into the room and found Mr. Watson *and his name* and Jim Sullivan and he

(Testimony of H. W. Keston.)

wanted the contract, that he was satisfied and wanted to make the papers out, and a little bit after we went upstairs, Watson, me and Stroh, and Stroh signed the papers, and me too.

Q. I call your attention to Plaintiffs' Exhibit "F" and ask you if that is the paper you saw Stroh sign.

A. It seems to be the paper. That is Henry Stroh's name. [124]

Q. And that is your signature?

A. I think so, but it is three years ago and I cannot recollect very well.

Q. Is that the only paper you witnessed there?

A. Yes, sir.

Q. Did you hear at any time you were there with Mr. Stroh and Mr. Watson how much he would have to pay for this stallion?

A. It was in the paper. He was to pay \$2,400.00 and it was in the paper some place, I remember.

Q. Did you see this paper at all, referring to Plaintiffs' Exhibit "A"?

A. No, sir, I just signed my name to the one.

Q. Mr. Poindexter was not there, was he?

A. No, sir, I did not see Poindexter there at all.

Cross-examination by Mr. BROWN.

Q. Do you own a farm near Farmington?

A. No, sir; I stay with a friend there.

Q. You stay with a friend there?

A. Yes, sir, Lester Morrison.

Q. How long have you been living there?

A. About nine months.

Q. Where were you living at the time you signed

(Testimony of H. W. Keston.)

this paper? A. I was near Tekoa.

Q. You just happened down there at that time?

A. Yes, sir.

Q. In the paper you signed your name to it said to pay \$2,400.00 for the horse.

A. Mr. Watson read the paper.

Q. And it said that?

A. I do not know anything about that.

Q. Why did he read it over? [125]

A. He said the horse was \$2,400.00 and wanted so much time to pay it in and I do not know how much.

Q. That was the paper you signed?

A. Yes, sir.

Q. Now, Bill, did Watson give you any money for going up there?

A. He paid my expenses for staying in town.

Q. How much did he pay you?

A. \$25.00.

Q. When did he pay you that?

A. Before I signed the paper.

Q. He gave you \$25.00 to put your name on the paper, was it? He paid you for that?

A. Sure.

Q. Did you understand the question, Witness?

A. I signed the paper but he did not pay me for that. I stayed three or four days in town.

Q. At that time?

A. Yes, sir, and that was what he gave me the money for.

Q. Did he give you that before or after you signed?

A. When he went away the first time, Mr. Stroh,

(Testimony of H. W. Keston.)

Mr. Watson asked me if I would be around again, and I told him I wanted to go to Colfax and did not have the money to stay in town that long.

Q. And how long did you stay there?

A. When he sold the horse he gave the money to me three or four days after. I do not remember exactly.

Q. He gave you \$25.00? A. Yes, sir.

Q. And what did he give you that for?

A. To pay my expenses.

Q. Did you see Mr. A. R. Knight and Thomas Poindexter, on the 8th of May at Lester Morrison's place? [126] A. Yes, sir.

Q. Did you have any talk with them about the \$25.00?

A. Yes, sir, I did. They asked me about it.

Q. Did you not say to Thomas Poindexter and A. R. Knight, at Lester Morrison's place on May 8th that Watson gave you \$25.00 to sign a paper as a witness that Stroh gave Watson, wherein Stroh was to pay \$800 in cash and a note for the balance to pay the price of a horse?

A. I told Mr. Knight that one note I signed between Stroh and Watson.

Q. Did you not tell them what I read you?

A. No, sir, I said he gave me \$25.00. He paid me \$25.00 for my expenses while in town.

Q. Did you tell them in that paper that Stroh signed he was to pay \$800.00 in cash and give a note and mortgage to secure the other money?

A. I told them what I understood, that he was to

(Testimony of H. W. Kerston.)

pay \$800, in cash and give a mortgage on a ranch. That was the understanding.

Q. That was the understanding of the contract between Stroh and Watson as they stated to you at that time?

A. Yes, sir, but I do not know nothing about Poin-dexter signing the paper.

Redirect Examination.

Q. All you know about the note is that you heard the conversation in which Watson stated there were certain payments to be made on the note. Is that all?

By Mr. BROWN.—I object as leading.

By the COURT.—Sustained. [127]

To which ruling of the Court plaintiffs then and there excepted and which exception was duly allowed.

Q. Now, Mr. Kerston, as I understand you, you did not read over the instrument you signed to know what was in it? A. No, sir, I did not read it.

Q. You just signed it as a witness to Stroh's signature? A. Yes, sir.

Q. When you came up there, Mr. Kerston, did you tell Mr. Watson that Stroh asked you to come up there as a witness for him?

A. I told Stroh I would.

By the COURT.—Did you tell Mr. Watson when you came up there that Mr. Stroh asked you to come up there as a witness? A. Yes, sir.

(Witness excused.)

[Testimony of James Sullivan, for Plaintiffs.]

JAMES SULLIVAN, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. What is your name?

A. James Sullivan.

Q. Where were you in February, 1911?

A. In Farmington, Washington.

Q. You were employed by Mr. Watson?

A. Yes, sir.

Q. You were looking after the horse Ithos?

A. Yes, sir.

Q. Do you remember the circumstance of Thomas Poindexter signing Plaintiffs' Exhibit "A." [128]

A. Yes, sir.

Q. I will ask you to state whether or not at the time Mr. Poindexter signed the note that the amount of the note and the payments were filled in.

A. Yes, sir.

Q. Where was that signed?

A. In the Farmington Hotel on the showcase.

Q. Did you see Mr. Stroh sign the note?

A. No, sir.

Q. You moved this horse Ithos from Garfield to Farmington? A. Yes, sir.

Q. Did you have any trouble in getting him over?

A. I got him mired down in the mud.

Q. What I meant to bring up, did you have any trouble getting him over on account of his physical

(Testimony of James Sullivan.)

condition? A. No, sir.

Cross-examination by Mr. BROWN.

Q. Who was present when Exhibit "A" was signed by Poindexter?

A. Mr. Watson and Mr. Poindexter.

Q. Was anybody else present?

A. No, sir, nobody.

Q. And it was signed whereabouts in the hotel?

A. On the show case in the cigar-stand.

Q. And what time of day was it?

A. Just about dinner-time.

Q. And no one else was about? A. No, sir.

Q. No one was in the office of the hotel?

A. No, sir.

Q. Where were you standing when the paper was signed?

A. Right close to the counter.

Q. Who asked you to go there? [129]

A. Nobody.

Q. How did you come to be there?

A. I was in there waiting to go to dinner.

Q. Did Mr. Watson ask you to see the signature made? A. No, sir.

Q. What did you stop there for?

A. I was not doing anything but waiting.

Q. You were not interested in the note, were you?

A. No, sir.

Q. Where did you stand with reference to Poindexter when he was signing?

A. Right alongside of him.

Q. To his right or to his left?

(Testimony of James Sullivan.)

A. To his left.

Q. And where did Mr. Watson stand?

A. I do not just remember.

Q. You do not know whether he was there, Watson?

A. I saw Poindexter sign his name, and Watson was there but I could not say just where he was standing.

Q. What interest did you have to look at the note to see if it was filled up? A. None.

Q. And notwithstanding you looked at it?

A. Yes, sir.

Q. And you did not go to dinner until after the note was signed?

A. No, sir, I was waiting for Mr. Watson to go.

Q. You were working there for Mr. Watson?

A. Yes, sir.

Q. And you knew that there was a deal on between the parties? A. Yes, sir. [130]

Q. Did you look at the date of this instrument?

A. No, sir, I did not.

Q. Did you notice how the payments were to be made on this note? A. Yes, sir.

Q. How were they to be made?

A. In one, two and three years.

Q. When did you first see the note after it was signed at that time? A. Four days afterwards.

Q. And where did you see it?

A. On the train.

Q. Who showed it to you? A. Mr. Watson.

Q. And after it was signed you did not see it until

(Testimony of James Sullivan.)

four days afterwards? A. No, sir.

Q. And where were you going at that time?

A. To Garfield.

Q. And when did you see it next?

Q. You were not a witness in the former trial of this case, were you? A. No, sir.

Q. You observed the one, two and three year clauses in the note at the time it was signed?

A. Yes, sir.

Q. Did you take particular notice of it?

A. Yes, sir.

Q. Did you take any notice as to what the original amount in the note was? A. Yes, sir.

Q. And what was it? A. \$2,800.00 [131]

Q. How long did you stand there while Mr. Poindexter was signing the note?

A. Probably five minutes.

Q. Did Mr. Poindexter say anything?

A. Not that I heard.

Q. Did Mr. Watson say anything?

A. Not that I heard.

Q. Where was Mr. Haines, the proprietor of the hotel? A. I do not know.

Q. Was there anybody in the hotel office at that time? A. No, sir.

Q. This showcase you spoke of is on which side of the office? A. I think it is on the west side.

Q. Was it a glass case? A. Yes, sir.

Q. And what was in it? A. Cigars.

Q. Was it sitting on the office desk or—

(Testimony of James Sullivan.)

A. It was sitting on the floor. It was a case by itself.

Q. Was it near the wall? A. Yes, sir.

Q. How long a case was it on which that note was signed?

A. I should judge about three and a half or four feet.

Q. And you were on the right or left hand side?

A. The left side.

Q. Where did he get the ink?

A. I think it was a fountain pen they used?

Q. Do you know that he had a fountain pen?

A. No, sir, I do not.

Q. There was a pen in the book where the guests sign? A. I do not remember. [132]

Q. Were you stopping at the hotel?

A. Yes, sir.

Q. How long had you been stopping there?

A. Seven or eight days.

Q. And you do not know where they took the ink from? A. No, sir.

Q. If you were standing to the left of Mr. Poindexter as he was signing the instruments, you would be next to the wall? A. Yes, sir.

Q. And he was farther out in the room?

A. Yes, sir.

Q. You do not know whether Mr. Watson stood on the other side or not? A. No, sir.

Q. What did he do with the note after he signed it?

A. I do not know.

Q. You do not know whether he put it in his pocket

(Testimony of James Sullivan.)

or did something else with it?

A. No, sir, I do not.

Q. Was there any indorsement on the back of it at the time he signed the note?

A. I did not see the back of it.

Q. Was there any indorsement made on the note in your presence? A. I did not see any.

Q. Are you sure that it was signed on this cigar-case? A. Yes, sir.

Q. You are as sure of that as you could be of anything else you have testified to? A. Yes, sir.

Q. Is it not a fact that the top of the cigar-case is oval or round, and not flat? [133]

A. I do not think so. I think it is flat.

Q. Are you positive that it was flat and that he laid it right down on the showcase? A. Yes, sir.

Q. Is it not a fact that the cigar-case where you say there was a cigar-case, that it is oval and has no top to it at all? A. No, sir, I think it is flat.

Q. But you know it was signed on that even if it was oval? A. Yes, sir.

Q. Over to the right of that, assuming that this is a bookcase, and over to the right was a register, blotting paper, ink and pen? A. I never saw any.

Q. Did you not see any of that on the hotel desk?

A. No, sir.

Q. How long did you stay there?

A. From about the 5th to the 17th.

Q. And you never discovered a book to register in?

A. Yes, sir.

Q. Not that laid over to the right of the cigar-case?

(Testimony of James Sullivan.)

A. I think so.

Q. And pen and ink was a little business that turned around? A. I guess there was some.

Q. Did Mr. Poindexter take that pen and ink and write from there, or did he walk over here?

A. He stood right there.

Q. You do not know whether he wrote it in with a fountain pen, or not?

A. No, sir, but I think he signed it with a fountain pen. [134]

Redirect Examination by Mr. NEAL.

Q. Where did Mr. Poindexter go after he signed this note? A. He went to dinner.

Q. Did Mr. Poindexter go into dinner with you and Watson? A. Yes, sir.

Q. And this was just before dinner?

A. Yes, sir.

(Witness excused.)

By Mr. NEAL.—I desire to read, Mr. Orland, in evidence the deposition of Judge O'Day, and presume you will waive the reading of the stipulation.

By Mr. ORLAND.—Yes, sir.

(Deposition of Judge O'Day read to the jury.)

**[Testimony of S. K. Watson, for Plaintiffs
(Recalled).]**

S. K. WATSON, being recalled as a witness on behalf of the plaintiffs, testified as follows:

Redirect Examination by Mr. NEAL.

Q. You heard the testimony of Mr. Keston in which he stated that you had given him \$25.00 for his expenses?

(Testimony of S. K. Watson.)

A. Mr. Keston was in Farmington and he come down to the barn with Mr. Stroh the first time he came down there, and he said that Stroh liked the horse very much. Keston told me that he thought he might help out with the sale and I told him I would not forget him if he did, and when we got through with the sale,—I had no bargain with him whatever,—but I gave him \$25.00 to pay his expenses. [135]

Defendant's Rebuttal.

[Testimony of Thomas S. Poindexter, in His Own Behalf (Recalled).]

THOMAS S. POINDEXTER, being recalled as a witness in his own behalf, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You heard the testimony of Mr. Watson with reference to having given you a \$20 bill to go to telephone? A. Yes, sir.

Q. State if he did. A. He gave me nothing.

Q. Did you go to the bank to telephone?

A. I did not.

Q. Did you ever telephone to the Bank of Winona to find out about the mortgage of Mr. Stroh's?

A. No, sir.

Q. Did anyone telephone for you? A. No, sir.

Q. Did you ever give Mr. Watson \$19.75 back in change? A. I did not.

Q. You heard the testimony of Watson in regard to his telling you it was a joint note when you signed it? A. I did.

[(Testimony of Thomas S. Poindexter.)

Q. Was anything of that character said to you?

A. No, sir.

Q. Or anything else other than what you have detailed upon the witness-stand? A. No, sir.

Q. Do you know the witness, Sullivan?

A. Yes, sir.

Q. Was he present at any time when you signed any papers? A. He was not.

Q. Was he present when you signed this note?

A. He was not. [136]

Q. You heard him testify here that you signed Plaintiffs' Exhibit "A" on a showcase in the office of the hotel? A. Yes, sir.

Q. Do you know what shape that showcase is?

A. Yes, sir, I do.

Q. The shape of the showcase where he stated you signed the note?

A. Yes, sir, the showcase is four or five feet long and stands north and south in the building and runs up to a corner, and the other part of the showcase goes on down to the dining-room table; and that part where he says I signed is oval and it would be very difficult to sign any paper whatever on; and the other showcase is six feet, down the other way, where he keeps the hotel register, and the pen and ink is all there together.

Q. You also heard the testimony here that you went into the parlor and signed some papers. You may state if you signed any papers in connection with this transaction in the parlor of the hotel.

A. I did not.

(Testimony of Thomas S. Poindexter.)

Q. Did you ever see Mr. Keston in connection with any signing of papers anywhere? A. No, sir.

Q. He never witnessed your signature anywhere?
A. No, sir.

Cross-examination.

Q. Is there a portion of the showcase that is flat on top? A. Yes, sir.

Q. After the note was signed, or at any time, did you go into the dining-room and have dinner with them there? [137] A. I might have sometime.

Redirect Examination.

Q. Now, the day you signed Plaintiffs' Exhibit "A," you say was the last day Watson was there. Did you eat dinner with Watson that day?

A. No, sir, not the last day.

Recross-examination by Mr. NEAL.

Q. You say you signed Exhibit "A" on the last day that Watson was there? A. Yes, sir.

(Witness excused.)

By Mr. NEAL.—If the Court please, at this time, in order to save my record on the question of the negotiability of this note, I desire to move the Court to instruct the jury to return a verdict for the plaintiffs upon the ground that the note sued upon is an negotiable instrument and the evidence shows, as it appears from the depositions of J. M. Leiter, A. C. Ruby and Floyd J. Campbell, which were offered in evidence and rejected by the Court and an exception allowed, that the plaintiffs herein are *bona fide* owners and owners of the note in due course for value.

without any notice of the defenses claimed by the defendants.

By the COURT.—The motion will be denied.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. [138]

By Mr. NEAL.—Would the Court indicate what will be submitted to the jury? Will that be similar to the instructions in the other case or will the other question be added?

By the COURT.—I shall have to submit the latter questions as to whether or not Ruby & Company were willing to make good their guaranty.

(Argument.)

Instructions to the Jury by the Court.

As you have already, gentlemen of the jury, been doubtless made to understand, this suit is founded upon this written instrument which has been read to you and exhibited to you, denominated a STOCK-HOLDERS' PURCHASING CONTRACT. In language it is (here the instrument was read to the jury), and more or less it has been referred to during the course of the trial as a promissory note. It appears to be signed by the defendant and Henry Stroh, one of the witnesses. I will say that it is wholly unimportant that Henry Stroh is not a party to this suit, and you should be wholly uninfluenced by the fact that he is not made a party to the suit.

It is furthermore unimportant to you whether this instrument is to be called a promissory note or sim-

ply a contract. In other words, it makes no difference whether in law it is to be deemed a promissory note or a contract. In either case the defendant is bound if he signed it and if the consideration therefor has not failed, as I shall explain to you in the course of my instructions.

The plaintiffs here are assignees of this instrument, having secured the same from the original payee, A. C. Ruby. In [139] other words, you understand that on this paper's face it is payable to A. C. Ruby, and it was agreed during the course of the trial, that the plaintiffs here took an assignment of it and therefore have the same rights here as A. C. Ruby would have if the company were suing and not the plaintiffs. The plaintiffs have no greater right. Sometimes where an instrument is in what we call a negotiable form, as a check or ordinary promissory note, the *transfee* of such instrument has rights greater than the payee; but, for certain reasons which are unnecessary to explain you, I have held as a matter of law that this is not a negotiable instrument in the sense that the purchaser of it has greater rights than the payee; and therefore I say to you that the plaintiffs here stand in the shoes of A. C. Ruby, and have just as much right as he would have if it had never been transferred, but no greater right.

In this connection it is proper to call your attention to another feature of the case, and that is, it is ultimately immaterial to you whether the defendant Poindexter received all or only a part of the consideration for this instrument. In other words, it is

no defense in itself that he was to have, according to the testimony, only a part interest in the horse; that was purchasing and owned only a small interest in the horse. If he signed this instrument in the form in which it now is, and, if there was no breach of the warranty of the horse, or if A. C. Ruby & Company were willing to make good the breach of the warranty if there was one, then the defendant is liable here even though he got only a small interest. That is, he is liable for the full amount. As between him and Henry Stroh his rights would be different. If the instrument is a valid instrument against both, and Mr. Poindexter were compelled to pay it, Mr. [140] Poindexter could recover from Mr. Stroh the part he should have paid. I do not know that I need to explain that principle, for you no doubt are all aware of the rule; for instance, one of you wants to borrow \$100 from a bank and the banker says, "Get a signer," and some other man signs the note and you get the \$100; in such case the man is liable for the full amount of the note although he got no part of the money. But, of course, if he has to pay it, he can compel you to reimburse him for his loss. So coming back to this matter, if Mr. Poindexter is compelled to pay all of it to the plaintiffs, he could compel Mr. Stroh to pay him.

These are somewhat unimportant matters, and yet, in view of the range the argument has taken, I have thought it prudent to impress these principles on you in order to present clearly the real issues.

There are in reality two primary questions, and this is the first question: I want to make it clear to

you and as simple as possible. The first question is: Was this instrument (called Stockholders' Purchasing Contract) in the form in which it now appears when Mr. Poindexter signed his name to it? He admits here upon the stand that this is his signature. However, his first defense is that when he signed his name there the instrument was practically a blank. In other words, there was a printed form, but the written matter was not then entered, and that therefore it must have been filled out later by some other person, probably the holder. I say, this is his defense. The testimony, as you will observe, is conflicting upon that question. One or two of the witnesses say the instrument was a blank and others say it was filled out in the form in which it now appears. There are some circumstances tending to corroborate the plaintiffs and some the defendant, and it is for you, gentlemen, as best [141] you may, to carefully canvass all the testimony and try to reach a conclusion upon which side the truth lies. If you find with the defendant that this instrument was a blank, your verdict should be for the defendant, because he would not be bound by the action of anyone in later filling in the amount of the note. If, upon the other hand, you find he did sign this in its present form, then he is, upon the face of the instrument, bound by it and should be required to pay it, unless you find in his favor upon the other matter which I am about to call your attention.

I may say that the defendant having acknowledged his signature, this instrument makes a *prima facie* case for the plaintiff, and therefore the burden is on

the defendant to show by a preponderance of the evidence that it was not in this condition when he signed it. A preponderance is a greater weight of the evidence; not necessarily a greater number of the witnesses, but a greater weight; that which strikes you as being more credible and convincing. Assuming that you may possibly find against the defendant on that issue, we pass to the other question, and that is, the warranty.

It seems that at the time, or about the time, this transaction took place, the A. C. Ruby Company executed and delivered to the signers of this instrument what has been referred to as the guaranty or warranty,—this written instrument which I hold in my hand, and you will take it as embodying all the material representations which were made by A. C. Ruby Company to induce the defendant to sign the note or to purchase the horse. It is provided in the instrument, among other things, “that if the above-named stallion does not give satisfaction in every respect”—I think you may read it that way,—“so that if the above-named [142] stallion does not give satisfaction in every respect and get sixty per cent of the mares returned for second trial, we—that is, A. C. Ruby,—agree to furnish another stallion of the same quality and price on the delivery to our barns in Portland, Oregon. If the stallion above named should not be a breeder or true to pedigree furnished, we agree to furnish, etc.” You will see that the warranty or guaranty is very broad. It provides that if the animal does not give to the purchaser satisfaction in every respect, the purchaser has the priv-

ilege of returning him and getting another as good as this one was represented to be. In other words, if he was not satisfactory in every respect, it was the privilege of Stroh and Poindexter to return him and demand another.

Now, the first question of fact for you to consider under this warranty is as to whether or not there was a violation of it. Was this stallion Ithos up to the warranty? Was he a foal-getter? Was he satisfactory in every respect? I need not comment on that farther. It is for you to say whether he was up to this warranty. If you find that he was not up to the warranty, then what was the remedy? It was not to declare the bargain or transaction at an end and demand back the note, or, to refuse payment. The remedy was provided in the warranty; that is, to tender the horse back to A. C. Ruby and get such a horse as this one was represented to be, of the same grade, size and quality; such as they had a right to expect this one to be. That was their remedy, and the serious question here is as to whether or not it was tendered back; whether they did find him unsatisfactory, and, if so, whether they did make a tender, and the A. C. Ruby Company declined to make good their guaranty by delivering or transferring to them another horse of like breed and quality. Mr. Poindexter himself has stated that he did not make such a tender. I forget just what he did state, but I think he claimed that he turned his stock over to Mr. Stroh and that he himself did not [143] make such a tender, and hence, if it was made, it must have been made by Mr. Stroh. The mere fact that

Poindexter did not make a personal tender to the company would not make or constitute a refusal to tender, but either he or Stroh must have done so; otherwise the condition of the horse and his qualities as a foal-getter and all testimony relating to his being wind-broken would be immaterial; because, if they did not tender the horse back, they cannot complain that he was not up to the warranty. The testimony is conflicting upon this question. Stroh claims he made a tender and that A. C. Ruby had no such horse, none up to the standard of this horse; rather, of the quality he supposed it to be. If you believe his statements in that respect, you will find for the defense on that particular issue. On the other hand, Watson testified that they did have horses fully equal, and such horses were afterward taken to the fair and won premiums and were sold for a large price. Did Stroh tender the horse back in good faith, or, did he do so only ostensibly? Was he really willing to take any horse in exchange? Here, again, the burden is on the defendant, and he must show you by a preponderance of the evidence that the horse was not up to the warranty, and that he was tendered back to Ruby & Company, and that they were unable or unwilling to make good the warranty by giving another of the required standard.

It is for you, gentlemen, here, as in all jury cases, to determine the credibility of the witnesses and the weight to be given to their testimony. I do not intend to analyze the testimony or express an opinion as to its weight. That is a matter left entirely to you, and the responsibility will be upon you to do

justice between the parties.

Now, if you should find in favor of the plaintiffs, you should award to them \$2,400.00, together with interest thereon at eight per cent from February 14, 1911, and \$250.00 attorneys' [144] fees. Perhaps you can bear that in mind: \$2,400.00 principal and eight per cent interest from February 14, 1911. You can make a note of that now because I shall not send the pleadings with you. I doubt not that almost anyone of you can calculate the interest.

Of course, if you find for the defendant, your verdict will be for the defendant, and it will not be necessary for you to make any calculation.

It will be necessary for you to agree unanimously.

Two forms of verdict have been prepared for you; one is for the defendant, and if you agree on that your foreman may sign that. The other form is left for you to fill in, and that will be signed by the foreman after you have entered the amount.

By the COURT.—You may make your exceptions now if you desire, gentlemen.

[Exceptions in Behalf of the Plaintiffs.]

Exceptions in behalf of the plaintiffs are as follows:

The Court erred in refusing to give the following instruction No. 1, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A negotiable instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a

future time named in the instrument, and, under this rule the note sued on in this action is a negotiable, promissory note, and you should so regard it.”

The Court erred in refusing to give the following instruction No. 2, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely: [145]

“A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1st. It must be complete and regular upon its face, and I instruct that this note is such an instrument.

2d. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3d. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by the A. C. Ruby Company or its agent. Under such circumstances, plaintiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the note in due course, then the fact that the defendant may have been induced to sign the note, though the representations that he has testified to, would not discharge him from liability on

the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of plaintiffs, if you find that plaintiffs are holders in due course, for value, defendant cannot be held to defend against it.

4th. At the time the note was negotiated, plaintiffs must have had no notice of any informity in the note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to note, through [146] the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs.”

The Court erred in refusing to give the following Instruction No. 3, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant.”

The Court erred in refusing to give the following Instruction No. 4, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note.”

The Court erred in refusing to give the following Instruction No. 5, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely: [147]

“If you find, from the evidence, that when Campbell and Leiter received the note made by defendant, a copy of which is set forth in the complaint herein, in favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for.”

The Court erred in refusing to give the following Instruction No. 6, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim

that they are holders in due course, to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note.”

The Court erred in refusing to give the following Instruction No. 7, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note.”

The Court erred in refusing to give the following [148] Instruction No. 8, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be. When that paper is put into circulation and falls into the hands of an innocent holder.

And, on the facts in this case, if you find the plain-

tiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a reasonable attorney's fee, whatever might have been the result if this action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given."

The Court erred in refusing to give the following Instruction No. 9, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser's right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper." [149]

The Court erred in refusing to give the following Instruction No. 10, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown that in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiffs had knowledge of facts which would render the

same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of proving such knowledge, or bad faith, is upon the defendant."

The Court erred in refusing to give the following Instruction No. 11, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"There is one other phase of the defense which might be noticed. It is claimed by the defendant that he was to have his share for nothing, but this does not constitute a defense, it does not exempt him from liability, since the only evidence of it comes from him alone, and he cannot be heard for this purpose to impeach the written agreement which he executed, by undertaking to contradict that written statement by oral testimony. If that could be done, there would be no sanctity to written contracts."

And plaintiffs also except to the refusal of the Court to take from the jury the question or condition of the warranty of the horse, which exception was duly allowed. [150]

[Plaintiffs' Exhibit "A"—Stockholders' Purchasing Contract, Dated February 14, 1911.]

Leiter & Campbell v. Poindexter. Plaintiffs' Exhibit "A" for Identification. V. A. Crum, Notary Public. Nov. 11, 1912. H. P. Cummock. May 15, 1913.

STOCKHOLDERS' PURCHASING CONTRACT.

Feb. 14th, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53347 owned by the A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00. Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of the A. C. Ruby Co., the sum of Twenty Eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars....Oct.

1st 1911.

Nine Hundred and no 00 Dollars....Oct.

1st 1912.

Nine Hundred and no 00 Dollars....Oct.

1st 1913.

with interest from date at the rate of eight per cent. payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and

collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorney fees.

THOS. S. POINDEXTER.

HENRY STROH.

The A. C. RUBY CO.

A. C. RUBY. A. C. R.

Received payment as follows: 2/17 1911. Paid by Thos. S. Poindexter \$400.00, one-third to be applied on each of the three payments.

No. 525. Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [151]

[Plaintiffs' Exhibit "A-2"—Application for Insurance, Dated February 17, 1911.]

Plaintiffs' Ex. "A" #2. H. P. Cummock.

SPECIAL APPLICATION to be Used for Registered Stallions and Mares.

Application of Thomas S. Poindexter and Henry Stroh.

City or Town, Farmington. County, Whitman; State, Wash. P. O., Farmington.

The undersigned hereby applies for membership in the NATIONAL LIVE STOCK INSURANCE ASSOCIATION and for insurance on Live Stock herein described for a period of one year, in accordance with the stipulations named on the back of the Policy issued by the Association, which are made a part hereof as fully and completely as if they were recited at length over the signatures hereto affixed.

1. Name of animal: Ithos. 2. Stallion. 3. What breed: Percheron. 4. Cash value: \$2800. 5. Amount of insurance: \$1000.00. 6. Premium: \$100.00. Give full description. 7. Age: 3. 8. Color: Brown. 9. Weight: 1920. 10. Height: 17 hand. 11. How marked: Irregular star. 12. If white on head, legs or feet, describe fully: ———. 13. Give register: No. 53347. 14. Registered in Am. Bree. & in Perch. Reg. Co. 15. When foaled: 1908. 16. From whom purchased: The A. C. Ruby Co. 17. Date: This. 18. Name of sire: Conde 59486. 19. Name of dam: Rustique 27557. 20. For what purpose will the animal be used: Breeding. 21. Is the animal mortgaged: ———. 22. If so, to whom: ———. 23. For what amount: ———. 24. If owned by a company, how many shares do you own: ———. 25. What was cost: ———. 26. Is the animal perfectly sound and in healthy condition: Yes. 27. Has it had colic or other sickness within six months: No. 28. If stallion, give number of mares served last season: No. and percentage with foal: ———. 29. Is the animal kind disposition or vicious: Kind. 30. Is there any contagious disease among stock in your territory: None. 31. Where is the animal stabled: Farmington. 32. Do you exercise daily: Yes. 33. In case of sickness or accident, do you agree to notify this Association at once, [152] giving full particulars and name of veterinary employed: Yes. 34. Have you had any other insurance on this animal: No. 35. If so in what company and what amount: ———. 36. Do you agree to properly feed, exercise, and in case of sick-

ness or accident to secure at once a veterinary if possible to do so: Yes. 37. Have you lost any animals by death during past year: No. If so, how many: None. From what causes (answer fully): ———. 38. To whom shall indemnity be paid in case of loss: Thomas S. Poindexter. P. O. Address, Farmington. Premium to be paid cash, \$100. Note, \$ ———. Total Premium, \$ ———.

I warrant the foregoing application to contain a full, true and correct description and statement of the conditions, situation and value of the property hereby proposed to be insured; and have answered all of the foregoing questions of my own knowledge, and that the policy to be issued thereon shall be based entirely upon the answers contained in this application, and that they are true to the best of my knowledge and belief, that I have in no wise misrepresented or concealed any fact concerning said stock. Failure to pay premiums, cash or notes, or any part thereof, when due shall suspend insurance policy until such time as it shall be reinstated, as provided in the stipulations printed in the policy issued by the Association. Application, if accepted by the Home Office, will be in full force from noon of the date of application.

No agent is authorized to change or modify the conditions of this application, or of the stipulations in the policy which may be issued thereon.

Dated this 17th day of Feb., 1911.

THOMAS S. POINDEXTER,

Applicant.

S. K. WATSON,

Witness.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [153]

[Plaintiffs' Exhibit "B"—Check.]

Portland, Oregon, June 27—11. No. 340.

HARTMAN & THOMPSON, BANKERS.

Pay to A. C. Ruby or order \$4219.00, Forty-two hundred nineteen & no/100 Dollars.

FLOY J. CAMPBELL.

Endorsed: A. C. Ruby.

Endorsed: PAID. Merchants' National Bank.

Leiter & Campbell

vs.

Poindexter.

Plaintiff's Exhibit "B."

V. A. Crum, Notary Public.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [154]

[Plaintiffs' Exhibit "C"—Check.]

Portland, Or., June 27th, 1911. No. 2249.

THE UNITED STATES NATIONAL BANK OF
PORTLAND.

Pay to the order of A. C. Ruby \$4219.00, Four Thousand Two Hundred and Nineteen 00/100.

J. M. LEITER.

Endorsed: A. C. Ruby.

Endorsed: Paid through Portland Clearing House, Merchants' National Bank, June 29, 1911.

Leiter & Campbell

vs.

Poindexter.

Plaintiff's Exhibit "C."

V. A. Crum, Notary Public.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [155]

[Plaintiffs' Exhibit "C-2"—Complaint.]

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY STROH,

Plaintiff,

vs.

A. C. RUBY, S. K. WATSON, H. F. DEARDORFF, and THOMAS S. POINDEXTER,
Defendants.

Complaint.

Comes now the above-named plaintiff and charges and alleges the facts to be.

I.

That the plaintiff herein is a farmer living near Farmington in the State of Washington. That the defendants herein, to wit, A. C. Ruby and S. K. Watson and H. F. Deardorff are dealers in horses and all of them residents of Multnomah County, Oregon. That the defendant Thomas S. Poindexter is a resident of the State of Idaho, but whose place of business and post office address is the town of Farmington in the State of Washington.

II.

That heretofore, to wit, February 24th, 1911, the defendants A. C. Ruby, S. K. Watson and H. F. Deardorff hereinafter called said defendants, desired to sell and dispose of one certain imported Percheron stallion named Ithos, imported from France to the

United States in the year 1910, to wit, in February, 1911, said defendants took said horse to Farmington, Washington, for the purpose of selling the same.

III.

That said defendants entered into a conspiracy with the defendant Poindexter to sell this horse to the plaintiff herein and made arrangements with the said Poindexter to act as a [156] dummy by which said horse was to be sold to the plaintiff and the said Poindexter for breeding purposes, that being the only purpose and use they had for said horse, for the sum of \$2800.00. The said Poindexter was to ostensibly pay cash to said defendants in the sum of \$400, and the plaintiff was to give his note to A. C. Ruby Company (which company said plaintiff charges and alleges the fact to be on information and belief, consisted of A. C. Ruby, S. K. Watson and H. F. Deardorff, or one or more of said defendants) for the sum of Twenty-four Hundred Dollars (2400.00), which said note as plaintiff now recollects is payable in installments of Eight Hundred Dollars (\$800.00) per year with interest.

IV.

That said defendants represented that said horse was sound in all respects and of the full value of Twenty-eight hundred Dollars (\$2800.00). That said horse had no defects and that he was in every way suitable as a horse for breeding purposes, and this plaintiff, relying upon the representation of said defendants and believing that the defendant Poindexter was an actual and *bona fide* purchaser of a share in said horse, agreed with said defendants to

purchase said horse in connection with said Poindexter for the sum of Twenty-eight Hundred Dollars (\$2800), the defendant Poindexter paying Four Hundred Dollars (\$400.00) in cash and this plaintiff issuing his promissory note to A. C. Ruby Company for Twenty-four Hundred Dollars (\$2400.00), payable in installments of \$800.00 Eight Hundred Dollars per year with interest thereon.

That thereupon said defendants delivered to the said plaintiff and said Poindexter the horse and issued a contract, a copy of which is hereto attached and marked Exhibit "A" and made a part hereof and said plaintiff executed and delivered to said A. C. Ruby Company, his promissory note for Twenty-four Hundred Dollars (\$2400.00) as herein stated.
[157]

V.

That plaintiff further alleges that said horse was not a sound and perfect horse as represented by said defendants, and that said defendants entered into a scheme with the defendant Poindexter and used the said Poindexter as a dummy to effect the sale of said horse to this plaintiff. That said Poindexter did not pay said defendants or any of them (\$400.00) Four Hundred Dollars, or any sum or amount. That said horse was not a *perfect*; that said horse was not a sound horse; that said horse was, in fact, what is known as wind-broken. That said horse was represented to this plaintiff by said defendants to be a horse suitable and fit in every respect for breeding purposes. That in truth and in fact said horse is not fit for breeding purposes, and was not fit, at the time

of said sale, for breeding purposes, but was wind-broken and wholly unfit for breeding purposes. All of which was unknown to plaintiff till long after said sale.

VI.

This plaintiff charges and alleges the fact to be, that said defendants knew that said horse was not fit for breeding purposes and knew that he was diseased and wind-broken, and knew that said horse was practically of no value.

VII.

And this plaintiff charges and alleges the facts to be that said horse is and was at the time of said sale of no value for breeding purposes or otherwise, and that among other things in said contract of purchase it is provided that if the above-named stallion did not give satisfaction in every way that said defendants agreed to furnish another stallion of the same price and quality, upon delivery of the above-named stallion in as good and sound condition * * * to our barns in Portland, Oregon. [158]

VIII.

The plaintiff alleges that he is a German and does not understand the English language very well, and did not understand the full import of the writing given him as above stated, but relied upon the statements of said defendants that said horse was sound and relying thereon executed his note to A. C. Ruby Company as hereinbefore stated.

IX.

That after this plaintiff discovered that said horse was wind-broken and wholly unfit for breeding pur-

poses, he notified the said A. C. Ruby Company that said horse was valueless and in order to comply with what he, after said sale and discovery of the above facts, was advised and understood as the terms of said contract in the above transaction, this plaintiff shipped said horse to Portland, Oregon, from Farmington, Washington, in July, 1911, and to wit, July 15th, 1911, and to wit, again on July 17th, 1911, made a tender of this horse to the A. C. Ruby Company and especially to the above defendants Watson and Deardorff, and demanded from said defendants another horse or stallion of the same price and quality, and especially requested that said defendants take possession of said horse.

That said defendants refused to take possession of the horse in any respect and refused to receive same and deliver this plaintiff another horse of like price and quality, and refused to deliver to plaintiff his note given for said horse, but in furtherance of said defendant's conspiracy to cheat, rob and bilk the plaintiff, undertook to deliver to the plaintiff another horse that was of little or no value, to wit, not exceeding in value Six Hundred (\$600.00) to Eight Hundred (\$800.00) Dollars.

X.

Plaintiff further charges and alleges the facts to be that said defendants in making said sale to this plaintiff of said horse, conspiring and confederating together to work upon [159] this plaintiff a confidence game and to sell him the horse above stated for the sum of Twenty-four Hundred Dollars (\$2400.00), and in order to carry out their bilking

scheme and confidence game as to this plaintiff, used the defendant Poindexter as a dummy and under said arrangement and agreement the said Poindexter was to pretend to purchase an interest, to wit, the amount of Four Hundred Dollars (\$400.00) in said horse, and was to and did pretend to pay cash therefor, but in truth and in fact the said Poindexter did not pay Four Hundred Dollars (\$400.00) or any sum or amount to the said defendants or A. C. Ruby Company at all, but merely loaned himself to said defendants in order to carry out said defendants' confidence game and scheme to sell to this plaintiff said horse for the sum of Twenty-four Hundred Dollars (\$240.00), and to cheat, and defraud this plaintiff by selling him a horse that by reason of the fact that said horse was wind-broken and diseased, was wholly unfit for breeding or other purposes.

That if said horse had been perfectly sound and what said defendants represented said horse to be, that he would have been valuable to this plaintiff for breeding purposes of the reasonable value of Twenty-four Hundred Dollars (\$2400.00).

XI.

Plaintiff further charges and alleges the fact to be that he is advised and believes and upon information and belief so states, to wit, that the said defendants A. C. Ruby Company have negotiated or are about to negotiate the promissory note made and executed by this plaintiff to the said A. C. Ruby Company, for the purpose and with the intent of preventing this plaintiff from having any legal defense thereto, for the reason that same will be represented by a *bona*

fide purchaser in due course, and the plaintiff will be compelled to pay the same. [160]

XII.

Plaintiff further charges and alleges the fact to be that as nearly as this plaintiff can recollect said promissory note is negotiable in form, and for that reason this plaintiff would have no defense against said note in the hands of an innocent purchaser for value in due course. That unless said defendants are enjoined from transferring or negotiating said note, the said A. C. Ruby Company will negotiate same.

XIII.

That said plaintiff brought the said horse to Portland, Oregon, from Farmington, Washington, a distance of some six or seven hundred miles, in July, as herein stated, and that said horse is now in Portland, Oregon, and the said defendants refused to accept said horse and that this plaintiff is required to keep said horse, to wit, at a great expense of Seventy-five cents (\$.75) per day. That said plaintiff also as soon as he became the purchaser of said horse, to wit, on February 24th, 1911, caused said horse to be insured in the National Live Stock Insurance Association of Portland, Oregon, against death by disease, etc., for the sum of \$1000.00 One Thousand Dollars, for one year, and paid the premium thereon of, to wit, the sum of One Hundred Dollars (\$100) or ten per cent of the amount of the insurance.

XIV.

That at the time this plaintiff purchased said horse as above stated, said defendants represented to him that he might return said horse at any time, if he did

not prove satisfactory to him, and that this plaintiff relied upon said representation. That all the representations made to this plaintiff by said defendants were made as a result of a conspiracy between the said defendants and the said defendant Poindexter for the purpose of securing from this plaintiff his promissory note for the purchase price of said horse and for the purpose of cheating, defrauding and robbing this plaintiff by a confidence game and scheme by said defendants in [161] order to secure from said plaintiff his promissory note for the sum of Twenty-four Hundred Dollars (\$2400.00), and to cheat, defraud and rob this plaintiff of said sum; and all of said representations were false and were made with the intent and purpose and to the end that said plaintiff would give his promissory note for said horse to A. C. Ruby Company for Twenty-four Hundred Dollars (\$2400.00), and that the said defendants would thereby cheat, defraud, rob and steal from this plaintiff the said sum of Twenty-four Hundred Dollars (\$2400.00), and as a false token delivered to said plaintiff said diseased, wind-broken and worthless stallion, which said defendants knew to be wind-broken and worthless and by said confidence game to rob this plaintiff to the extent of his said promissory note, to wit, the sum of Twenty-four Hundred Dollars (\$2400.00), with interest thereon.

XV.

Plaintiff further charges and alleges the fact to be that he has been put to great expense in taking care of said worthless horse since he purchased same, and that said expense is of the reasonable price of Eight

Dollars per month; that in addition thereto he was compelled and did ship said horse from Farmington, Washington, to the city of Portland at an expense of Forty and 50/100 Dollars, and that he has been put to a great expense in taking care of said horse since said time in the sum of Forty Dollars, and in addition thereto the plaintiff has been put to the present expense in connection with said transaction in the sum of One Hundred Dollars.

XVI.

Plaintiff further charges and alleges the fact to be that said expenses will continue, to wit, the expense of taking care of said horse and of carrying on this litigation, and asks the Court to appoint a receiver to take charge of said horse until this litigation can be ended, and also that the defendants be enjoined in this suit from negotiating said plaintiff's note for Twenty-four [162] Hundred Dollars.

WHEREFORE, plaintiff prays: First, that a receiver be appointed to take charge of the horse herein until the further order of this Court.

Second: That the defendants be enjoined from negotiating plaintiff's said note for Twenty-four Hundred Dollars (\$2400.00).

Third: That these defendants be required to deliver up to this plaintiff, for cancellation, his note for Twenty-four Hundred Dollars (\$2400.00), and required by order of this Court to accept and take back this horse so fraudulently sold to this plaintiff by these defendants.

Fourth: That in case said defendants have negotiated said note of said plaintiff's and are unable to

deliver the same, that the plaintiff have judgment and a decree against said defendants for the sum of Twenty-four Hundred Dollars (\$2400.00) and interest thereon, and for the further sum of his costs and expenditures and disbursements hereinbefore set forth, and that in any event said plaintiff recover from said defendants the amount expended for keeping said horse since the purchase thereof, to wit, since February 24th, 1911, and the further sum of his costs and expenses in shipping said horse to Portland, Oregon, and in taking care of said horse since that time in *the of*, to wit, ——— Dollars, and in the further sum of his present expenses in retaining said horse, to wit, the sum of ——— dollars, and that said plaintiff have such other and further and different relief as may seem to the Court meet and just in the premises, and that said plaintiff recover from the defendants herein his costs and disbursements in this suit.

THOS. O. DAY and
SAMUEL OLSON,
J. M. HADDOCK,

Attorneys for the Plaintiff. [163]

EXHIBIT "A."

THE A. C. RUBY CO.

IMPORTERS AND BREEDERS OF
PERCHERON, BELGIAN, SHIRE & GERMAN
COACH STALLIONS.

900 Sandy Road, Portland, Oregon.

References:

American National Bank, Pendleton, Oregon.

Merchants National Bank, Portland, Oregon.

Portland, Oregon, Feb. 14, 1911.

KNOW ALL MEN BY THESE PRESENTS,
That we have this day sold the Imported Percheron
Stallion named Ithos No. 53347 (83515) to the Fol-
lowing Persons:

Here insert all the names of the Purchasers.

.....
.....
Thos. S. Poindexter P. O. Farmington Wn.
Henry Stroh P. O. " "
.....P. O.....
.....P. O.....
.....
.....

PURCHASE PRICE, Twenty Eight Hundred
(2800) Dollars.

GUARANTEE—If the above-named stallion does
not give satisfaction in every way and get sixty per
cent of the producing mares, that are properly bred
and returned for second trial at the end of the third

week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above-named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished, we agree to furnish another stallion [164] of the same price and quality, upon delivery of the above named stallion in as good and sound condition as he is at present, at our barns in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder or true to pedigree. Should the above named stallion not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by purchasers, or any verbal or written contracts or changes made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations of guarantees were made to them, as an inducement to purchase said stallion, or otherwise; except those contained in this instrument, and it is understood that The A. C. Ruby Company is not to be held liable upon any other warranty or representation except those contained in this instrument.

In the case of the above-named stallion's death or

any ailment that would render him unfit for services within four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn over the same to The A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof.

A. C. RUBY CO.

By A. C. RUBY.

Signature of Purchasers:

Accepted by: THOS. S. POINDEXTER.
HENRY STROH.

Address.

Farmington, Wn.
" " [165]

State of Washington,
County of Whitman,—ss.

I, Henry Stroh, being first duly sworn, depose and say that I am the plaintiff in the above-entitled suit, and that the foregoing complaint is true as I verily believe.

HENRY STROH.

Subscribed and sworn to before me this 29th day of July, 1911.

[Notarial Seal]

W. W. RENFREW,
Notary Public for the State of Wash.

[Endorsed]: Filed Aug. 24, 1911. F. S. Fields,
Clerk. By R. A. Reid, Deputy. [166]

State of Oregon,
County of Multnomah,—ss.

I, F. S. Fields, Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the foregoing copy of Complaint has been compared by me with the original and that it is a correct transcript therefrom and of the whole of such original Complaint as the same appear on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 2d day of Nov., A. D. 1912.

[Seal]

F. S. FIELDS,
Clerk of the Circuit Court.

State of Oregon,
County of Multnomah,—ss.

I, Robert G. Morrow, Judge presiding in Department No. Two of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that F. S. Fields is the duly elected, qualified and acting Clerk of the above-entitled court, and that his certificate hereto attached is in due form and by the proper officer.

ROBERT G. MORROW,
Judge.

State of Oregon,
County of Multnomah,—ss.

I, F. S. Fields, Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the Hon. Robert G. Morrow is the

duly elected, qualified and presiding Judge of Department No. Two of the above-entitled court, presiding [167] at the regular term of said court.

IN WITNESS WHEREOF, I hereby set my hand and affix the seal of said court, this 2d day of November, A. D. 1912.

[Seal]

F. S. FIELDS,
Clerk of Circuit Court.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [168]

[Plaintiffs' Exhibit "D"—Postal Card.]

In Evidence Plaintiffs' Ex. "D." Nov. 11, 1912.

H. P. Cummock.

POSTAL CARD.

(Address) Mr. S. K. Watson,

Garfield,

Wash.

Farmington, Wash. 2-25.

Mr. S. K. Watson,

Dear Sir:—

Send Stroh's note here to me or to the bank and he will pay it the Ins. note I will also write to Ruby & Co., at Portland as I don't know where you are for sure, horse is fine, yours truly,

THOS. S. POINDEXTER,

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [169]

[Plaintiffs' Exhibit "E"—Postal Card.]

Plaintiffs' Ex. E.—16. In Evidence Nov. 11, 1912.

H. P. Cummock.

POSTAL CARD.

Address:

A. C. Ruby & Co., Portland, Oregon.

Farmington, Wash. 3-6-11.

A. C. Ruby & Co., Portland.

Dear Sir:

I written to you about a week ago in regard to a note given Mr. Watson when here by Henry Stroh for Ins. on that Percheron Colt we bought he wants to take up the note so please send it here for collection or let me hear from you at once.

Yours truly,

T. S. POINDEXTER,

Sec.

No. 525. Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [170]

[Plaintiffs' Exhibit "F"—Receipt.]

In Evidence, Plaintiffs' Exhibit "F." Nov. 11, 1912.

May 15, 1913. H. P. Cummock.

Farmington, Wash. 2/17th, 1911.

This is to certify that we the undersigned have received from S. K. Watson for the A. C. Ruby Co. the Percheron Stallion Ithos No. 53344 (No. 83515) in

good condition satisfactory and *evry* as represented by S. K. Watson in the sale of said Stallion.

[Seal] THOS. S. POINDEXTER.

[Seal] HENRY STROH.

Witness:

W. W. THERSTEN.

[Endorsed]: No. 525. Filed May 15, 1913. A. L. Richardson, Clerk. [171]

[Plaintiffs' Exhibit "G."]

In Evidence, Plaintiffs' Exhibit "G." Nov. 11, 1912.

H. P. Cummock.

THE A. C. RUBY CO.

Importers and Breeders of Percheron, Shire & German Coach Stallions.

900 Sandy Road, Portland, Oregon.

References:

American National Bank, Pendleton, Oregon.

Merchants National Bank, Portland, Oregon.

Portland, Oregon, February 14, 1911.

KNOW ALL MEN BY THESE PRESENTS:

That we have this day sold the Imported Percheron Stallion named Ithos, No. 53347 (83515) to the following persons:

Here insert the names of the purchasers:

Thos. S. Poindexter. P. O. Farmington, Wash.

Henry Stroh. " " "

PURCHASE PRICE, Twenty Eight hundred no/100 \$2800.00 Dollars.

GUARANTEE—If the above named stallion does not give satisfaction in *every* and get sixty per cent of the producing mares, that are properly bred and

returned for second trial at the end of the third week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished we agree to furnish another stallion of the same price and quality, upon delivery of the above named stallion in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder of true to pedigree. Should the above named stallion [172] not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by the purchasers, or any verbal or written contracts made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations or guaranties were made to them as an inducement to purchase said stallion, or otherwise; except those contained in this instrument, and it is understood that the A. C. Ruby Co., is not to be held liable upon any other warranty or representation except those contained in this instrument.

In case of the above named stallion's death, or any ailment that would render him unfit for services with-

in four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn the same over to the A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof.

THE A. C. RUBY CO.

By A. C. RUBY.

(Signature of Purchasers:)

THOS. S. POINDEXTER, 1 share
HENRY STROH, 6 shares.

(Address)

Farmington, Wash.
" "

[Endorsed]: No. 525. Nov. 12, 1912. Filed May 15, 1913. A. L. Richardson, Clerk. [173]

[Plaintiffs' Exhibit "H"—Affidavit.]

State of Washington,
County of Whitman,—ss.

AFFIDAVIT.

Before me personally appeared C. F. Monroe, who being first duly sworn, on oath says: That the attached license certificate is a true copy of the original license certificate No. 127 issued to Stroh & Poin-dexter of Farmington as shown by the office records

of the Dept. of Animal Husbandry of Washington State College.

C. F. MONROE,
Asst. Animal Husbandman.

Subscribed and sworn to before me this 6th day of November, 1912.

WM. C. KRUEGEL,
Notary Public. [174]

[Plaintiffs' Exhibit "O"—Certificate.]

(Copy)

THE STATE COLLEGE OF WASHINGTON.

Department of Animal Husbandry.

CERTIFICATE OF PURE BRED STALLION.

No. 127.

Chapter 99, Laws of Washington, 1911.

The pedigree of the stallion Ithos No. 53347 (83515)

American Foreign

Owned by Stroh & Poindexter.

P. O. Farmington, R. F. D. County,
Whitman.

Described as

Certificate sound by B. F. Price.

Breed, Percheron. Color, Bay. Marks, Irregular
Star.

..... Foaled in the year 1908, April 19; has been
examined at the State College, and it is hereby
certified that the said stallion is of pure breed-
ing and is registered in a stud book recognized

by the Department of Agriculture, Washington,
D. C.

W. T. McDONALD,
Professor of Animal Husbandry.

[Seal]

Per C. F. MONROE.

Dated at Pullman this 19th day of June, 1911.

Note: This certificate must be recorded with the Auditor of the County in which the stallion is to be used, and must be renewed in June, 1913.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [175]

[Plaintiffs' Exhibit "I"—Stipulation.]

It is hereby stipulated and agreed by and between Henry Stroh and Thos. S. Poindexter as follows, to wit:

The parties hereto purchase a horse from A. C. Ruby Company which they claim is wind broken and of no value. This purchase was made, to wit: February 14, 1911, for Twenty-eight Hundred Dollars (\$2800.00) for which a note was given on which there is endorsed a payment of Four Hundred Dollars (\$400.00), to wit: February 17, 1911. This horse is now in Portland, and;

WHEREAS action has been brought by the assignee of A. C. Ruby Company against Thos. S. Poindexter in the Circuit Court of the United States for the Northern District of Idaho upon the note alleged to have been signed by both parties hereto and now it is desired that the parties hereto settle the matter in the following manner; that is to say the above-named Henry Stroh hereby turns over to the above named Thos. S. Poindexter the horse and

all interest in the same that he has in every way, upon condition that the said Thos. S. Poindexter makes a satisfactory settlement with the assignees of the A. C. Ruby Company, or with A. C. Ruby Company, so that said note shall be paid and discharged and all liability of the said Henry Stroh thereon extinguished and that in consideration that the said Poindexter shall so settle and discharge said note, the above Henry Stroh hereby assigns to the said Poindexter all right, title and interest in said horse and also hereby agrees to dismiss certain suit that he has pending in Multnomah County, Oregon, against A. C. Ruby, et al., and also agrees to acquit A. C. Ruby from any cost, expense or damage by reason of the sale of said horse or otherwise in all and every respect. Whereupon it is hereby agreed that the said Poindexter shall settle and discharge the note above referred to and hold the said Henry Stroh harmless from any liability therein and Henry Stroh on his [176] behalf hereby transfers and assigns to the said Poindexter all right, title and interest in the above named horse and also hereby agrees to immediately, as soon as said liability is settled, to dismiss his suit against A. C. Ruby Company and to acquit said A. C. Ruby Company from each and every transaction referred to herein and also acquit the said Poindexter from any liability, any cost or expense in connection with the transaction herein referred to.

This contract made and signed in duplicate at Portland, Oregon, this 6th day of January, 1912.

HENRY STROH.

THOS. S. POINDEXTER.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [177]

[Plaintiffs' Exhibit "K"—Letter.]

In Evidence, Plaintiffs' Ex. "K," 16. Nov. 11, 1912.

H. P. C.

Portland, Oregon, Jan. 25, 1912.

Mr. Thos. S. Poindexter,

Farmington, Wash.

Dear Sir:—

My new shipment of horses are now at home and getting in good shape. Come down and make your selection according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they dont look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming.

Respectfully yours,

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [178]

[Plaintiffs' Exhibit "M"—Letter.]

Plaintiffs' Exhibit "M." Nov. 11, 1912. May 15, 1913. H. P. C.

HOTEL FARMINGTON,

W. D. Haynes, Proprietor.

Farmington, Washington, Sept. 4th, 1911.

Mr. J. M. Leiter,

Dear Sir:—

I received a notice from you to settle some interest on a note given to A. C. Ruby & Co. Portland, signed by me and Henry Stroh. Now I paid no at-

tention to it as I did not owe the Co. anything, now then since then that note has been sent here for the interest which I refused to pay. Now I just thought I would explain the matter a little to you and you could do as you please A. C. Ruby's man Watson came here with a horse to sell and offered several men here to help him sell the horse and he would give them one share the horse to sell at \$2800 dollars or \$400 per share so he made the sale of the horse of 6 shares to Henry Stroh and told me that Stroh gave him as security a note and mortgage on a ranch so all the paper that I signed was just the contract and their agreement which was necessary to accept the horse but never signed any note at all. So if he has my name on a note it is forged there by this man Watson or their Co. because I never saw such a note before until it came here for collection.

T. S. POINDEXTER.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [179]

[**Plaintiffs' Exhibit "P"—Day-Letter (Telegram).**]

Plaintiffs' Ex. "P." In Evidence Nov. 12/12. H.

P. C. May 15, 1913.

Day Letter. The Western Union Telegraph Company.

Received at 76 Third St., Cor. Oak, Portland, Ore.

74 UN. HW. 48 Blue

749.

MP, New York, Jan. 5, 1912.

Wilson and Neal,

Room 631, Chamber of Commerce, Portland,
Oregon.

I will give them any horse they want will guar-

antee satisfaction I would not pay any costs or expense and would want everything cleared up and cash or notes secured will hardly be home before eleventh if not settlement made you should get service on them in Portland.

A. C. RUBY.

6:14 PM.

No. 525 Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [180]

[Plaintiffs' Exhibit "R"—Letter.]

GEORGE ROSSMAN.

A. KING WILSON ('92)
Commercial and Corporation Law,
Irrigation, Use of Streets.

O. A. NEAL ('99)
Mining Law, Real Estate Bank-
ruptcy and Estates.

Law of Insurance and Carriers.

WILSON & NEAL,

Attorneys at Law.

630-632 Chamber of Commerce.

Both Phones, A—1370, Main 1370

Portland, Oregon, Jany. 7, 12.

Messrs. Forney & Moore,

Moscow, Idaho.

Gentlemen:—

Your telegram received; have agreed with Poin-
dexter that if he will pay over to you the sum of
\$2722.25 the case may be dismissed and settled. Of
this amount you are to deduct your fee \$50.00 and
the court costs that have been incurred. We have
advised our attorneys in case pending in Spokane to
hold case there in abeyance until they hear from us
further. And as soon as we hear from that case has
been settled we will dismiss the case there. Mr.

Poindexter is leaving for home today and will no doubt see you in a few days. If you still have the note, and he settles up deliver it to him; if you have already returned it to us we will forward it to him as soon as case is settled. We remain,

Yours truly,

WILSON & NEAL.

By O. A. NEAL.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [181]

[Plaintiffs' Exhibit "W"—Summons.]

*In the Circuit Court of the United States for the
District of Idaho, Central Division.*

No. 525.

J. M. LEITER and FLOYD J. CAMPBELL,

vs.

THOS. S. POINDEXTER.

Summons.

The President of the United States to Thos. S. Poindexter the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Moscow in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Central Division of said district, or if served within any other division of said district, then within forty days from the date of such service upon you; and if you fail so to appear and

answer, for want thereof, the plaintiffs will apply to the Court for the relief demanded in the complaint, to-wit:

Judgment against the defendant for the sum of \$2400.00 with interest thereon from February 14, 1911, at eight per cent per annum until paid, and for the sum of \$350.00 attorneys' fees herein and for the costs and disbursements in this action. The facts more fully appearing in plaintiffs' complaint, a certified copy of which is attached hereto and made a part hereof.

And this is to COMMAND you the MARSHAL of said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.
[182]

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise, in said District this 20th day of December, 1911.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [183]

**[Defendant's Exhibit No. 1 for Identification—
Certificate of Stock.]**

Capital Stock \$2800.00 Number of Shares—7

CERTIFICATE OF STOCK.

This is to certify, that we have sold to Mr. Thomas Poindexter, one shares of stock valued at \$400.00 paid in full per share, in the Imported Percheron Stallion named Ithos, No. 53347 (83515).

Dated at Farmington, State of Wash. this 13th day of Feb. 1911.

THE A. C. RUBY CO.

By S. K. WATSON, Agent.

Portland, Oregon.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [184]

**[Plaintiffs' Exhibit 2—Day-Letter (Telegram).]
DAY LETTER.**

The Western Union Telegraph Company.
Received at 76 Third St., Cor. Oak, Portland, Ore.
S 178 EA. 30 Collect Blue.

Moscow, Idaho, 8. Jan. 8, 1912, 11 A. M.
Wilson & Neal,
Chamber of Commerce,
Portland, Ore.

Can't fix fees no bills Clerk or Marshal both Boise,
Estimated twenty five dollars fee if defendant pays
fifty dollars, of client whatever you think reasonable.
Letter mailed today.

FORNEY & MOORE.

Plaintiffs' Exhibit 2. Nov. 12, 12 H. P. C.

[Endorsed]: No. 525. Nov. 12, 1912. Filed May 15, 1913. A. L. Richardson, Clerk.

Order Settling and Allowing Bill of Exceptions.

The foregoing is this day duly settled and allowed
as the plaintiffs' bill of exceptions.

October 3d, 1913.

FRANK S. DIETRICH,

Judge. [185]

**[Stipulation for Allowance of Bill of Exceptions,
etc.]**

IT IS STIPULATED by the attorneys for the re-

spective parties hereto, that the foregoing BILL OF EXCEPTIONS is true and correct and that the same may be allowed by the Court and made a record in this cause.

WILSON & NEAL,
FORNEY & MOORE,
Attorneys for Plaintiffs.

Attorneys for Defendants.

Service of a copy accepted this 4th day of September, 1913.

C. J. ORLAND,
Attorney for Defendant.

[Endorsed]: Delivered and received for filing this 3d day of September, A. D. 1913. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. Refiled Oct. 3, 1913. A. L. Richardson, Clerk. [186]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant,

**Petition for Writ of Error and Order Allowing
Same.**

The above-named plaintiffs conceiving themselves aggrieved by the decision and judgment of the Court, made and entered herein on the — day of May, A. D. 1913, in the above-entitled cause, do hereby pray for a Writ of Error from said decision and judgment,

to the United States Court of Appeals, in and for the Ninth Judicial Circuit of the United States, and pray that a writ of error may be allowed and that a transcript and record of the proceedings, upon which said decision and judgment were rendered, duly authenticated, may be sent to the said Court of Appeals.

J. H. FORNEY.

FORNEY & MOORE,

WILSON & NEAL.

AND NOW, to wit, on this 18th day of October, A. D. 1913, it is ordered that the foregoing petition and writ be allowed, as prayed for, upon said plaintiffs giving bond for the sum of Three Hundred (\$300.00) Dollars.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [187]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

AT LAW—NO. ———.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs,

vs.

THOMAS S. POINDEXTER,

Defendant,

Assignment of Error.

Now comes J. M. Leiter and Floyd J. Campbell, plaintiffs in error in the above numbered and entitled cause, and in connection with their petition

for a writ of error in this cause assign the following errors which plaintiffs in error aver occurred on the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

First: The Court erred in refusing to permit the plaintiffs to offer in evidence and read to the jury the depositions of J. M. Leiter and Floyd J. Campbell, plaintiffs, and of the witness A. C. Ruby, tending to show that the plaintiffs were *bona fide* holders of the note for value and that they took it before it became due without notice of any defenses thereto.

Second: The Court erred in instructing the jury that the instrument sued upon in this cause, reading as follows:

“STOCKHOLDERS’ PURCHASING CONTRACT.

Feb. 14th, 1911.

After a good and satisfactory examination of the percheron Stallion named Ithos No. 53347 owned by the A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said Stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty Eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

[188]

One Thousand and no 00 Dollars. . Oct. 1st, 1911.

Nine Hundred and no 00 Dollars. . Oct. 1st, 1912.

Nine Hundred and no 00 Dollars. . Oct. 1st, 1913.

with interest from date at the rate of eight per cent payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER,
HENRY STROH."

was not a negotiable promissory note.

Third: The Court erred in instructing the jury as shown by the instructions given by the Court, for the reason that said instructions took from the jury the question whether the plaintiffs were *bona fide* holders of the note sued upon, and informed the jury that the plaintiffs were not *bona fide* holders thereof.

Fourth: The Court erred in refusing to give the following instruction No. 1, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"A negotiable instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a future time named in the instrument, and, under this rule the note sued on in this action is a negotiable promissory note, and you should so regard it."

Fifth: The Court erred in refusing to give the following instruction No. 2, requested by the plaintiffs, for the reason that the said instruction is not em-

braced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1. It must be complete and regular upon its face, and I instruct you that this note is such an instrument.

2nd. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3rd. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by The A. C. Ruby Company or its agents. Under such circumstances, plaintiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the said note in due course, then the fact that the defendant may [189] have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability on the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of the plaintiffs, if you find that plaintiffs are holders in due

course, for value, defendant cannot be held to defend against it.

4. At the time the note was negotiable, plaintiffs must have had no notice of any infirmity in this note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs.”

Sixth: The Court erred in refusing to give the following Instruction No. 3, requested by plaintiffs, for the reason that the said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

“One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant.”

Seventh: The Court erred in refusing to give the following Instruction No. 4, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court and is further based upon the facts in the case, viz.:

“The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a

holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note."

Eighth: The Court erred in refusing to give the following Instruction No. 5, requested by the plaintiffs, for the reason that said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find from the evidence that when Campbell and Leiter received the note made by the defendant, a copy of which is set forth in the complaint herein, in favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for."

[190]

Ninth: The Court erred in refusing to give the following Instruction No. 6, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim that they are holders in due course to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can

consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note.”

Tenth: The Court erred in refusing to give the following instruction No. 7, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note.”

Eleventh: The Court erred in refusing to give the following Instruction No. 8, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be, when that paper is put into circulation and falls into the hands of an innocent holder.

And on the facts in this case, if you find the plaintiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a

reasonable attorney's fee, whatever might have been the result if the action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given."

Twelfth: The Court erred in refusing to give the following Instruction No. 9, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:
[191]

"One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser's right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper."

Thirteenth: The Court erred in refusing to give the following Instruction No. 10, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiff had knowledge of facts which would render the same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of prov-

ing such knowledge, or bad faith, is upon the defendant.”

Fourteenth: The Court erred in refusing to give the following Instruction No. 11, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“There is one other phase of the defense which might be noticed. It is claimed by the defendant that he was to have his share for nothing, but this does not constitute a defense, it does not exempt him from liability, since the only evidence of it comes from him alone, and he cannot be heard for this purpose to impeach the written agreement which he executed, by undertaking to contradict that written instrument by oral testimony. If that could be done, there would be no sanctity to written contracts.”

Fifteenth: The Court erred in refusing to take from the jury the question as to the warranty of the condition of the horse, for the reason that it appears from the testimony that all the terms of the guaranty, are contained in the written guarantee (marked Exhibit “A”), and it appearing from said guarantee that in case of breach thereof the defendant was to return the horse to the barns of The A. C. Ruby Company at Portland, Oregon, and receive another stallion in his stead. The testimony of defendant shows that he never at any time returned the stallion to the barns of A. C. Ruby Co. at Portland, Oregon, though Henry Stroh did testify to the effect that he returned the stallion [192] and was un-

able to find one that suited him in exchange. But the admitted testimony shows that the A. C. Ruby Company repeatedly offered to make good the guarantee, and to give defendant another stallion, as is shown by the testimony of the defendant himself as follows:

Q. Mr. Ruby has at all times offered to give you another horse, has he not?

A. He has offered several times to give me another horse but I never had any horse to trade.

And defendant also admitted that he received from Ruby & Company a letter or telegram reading as follows:

“Portland, Oregon, Jan. 25, 1912.

Mr. Thos. S. Poindexter,
Farmington, Wash.

Dear Sir:—

My new shipment of horses are now at home and getting in good shape. Come down and make your selection according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they don't look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming.”

WHEREFORE, plaintiffs in error pray that the judgment of said Court be reversed, set aside and held for naught.

J. H. FORNEY,
FORNEY & MOORE and
WILSON & NEAL,
Attorneys for Plaintiffs in Error.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [193]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS,
That the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation authorized and empowered, under the laws of the State of Idaho, to become surety on bonds, undertakings, etc., in the State of Idaho, is held and firmly bound unto defendant Thos. S. Poindexter, in the full and just sum of Three Hundred Dollars, to be paid to the said Thos. S. Poindexter, his attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, by these presents.

Signed and dated this 9th day of October, A. D. 1913.

WHEREAS lately, at a regular term of the District Court of the United States, for the District of Idaho, Central Division, sitting at Moscow in said District, in an action pending in said court between

J. M. Leiter and Floyd J. Campbell, as plaintiffs, and Thos. S. Poindexter, as defendant, carrying No. 525 on the law docket of said court, final judgment was rendered against the said plaintiffs for the sum of \$179.50, Dollars, costs and disbursements, and the said plaintiffs have obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid action, and a citation directed to the said Thos. S. Poindexter, defendant in error, [194] citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty days from the date hereof.

NOW the condition of the above obligation is such that, if the said J. M. Leiter and Floyd J. Campbell, plaintiffs, shall prosecute their Writ of Error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY.

[Corporate Seal]

By E. L. THOMPSON,

Its Attorney in Fact.

J. M. LEITER.

FLOYD J. CAMPBELL.

Witness:

O. A. NEAL.

Approved this 18th day of October, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [195]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Writ of Error [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the District of Idaho:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said District Court before you, or some of you, between J. M. Leiter and Floyd J. Campbell, plaintiffs, and Thomas S. Poindexter, defendant, a manifest error hath happened, to the great damage of the said J. M. Leiter and Floyd J. Campbell, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals

for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 17th day of November, 1913, in said Circuit Court of Appeals for the Ninth [196] Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of October, 1913, of the Independence of the United States the one hundred thirty-eighth year.

[Seal] A. L. RICHARDSON,
Clerk U. S. District Court, District of Idaho.
Allowed by:

FRANK S. DIETRICH,
District Judge. [197]

[Endorsed]: (Original.) No. 525. In the United States District Court, District of Idaho, Northern Division. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Writ of Error. Filed October 18, 1913. A. L. Richardson, Clerk. [198]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Citation [on Writ of Error].

The President of the United States, to Thomas S.
Poindexter and C. J. Orland and J. T. Brown,
His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein J. M. Leiter and Floyd J. Campbell are plaintiffs in error and the said Thomas S. Poindexter is defendant in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of October, 1913, of the Independence of the United States the

one hundred and thirty-eighth year.

FRANK S. DIETRICH,

District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [199]

[Endorsed]: (Original.) No. 525. In the District Court of the United States for the District of Idaho, Central Division. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Citation. Filed Oct. 23, 1913. A. L. Richardson, Clerk.

Service by copy of annexed citation and also copy of Writ of Error is hereby admitted at Moscow, this the 21st day of October, 1913.

C. J. ORLAND,

Attorney for Defendant. [200]

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal]

A. L. RICHARDSON,

Clerk. [201]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 202, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$105.30, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said court this 25th day of October, 1913.

[Seal]

A. L. RICHARDSON,
Clerk. [202]

[Endorsed]: No. 2335. United States Circuit Court of Appeals for the Ninth Circuit. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Central Division.

Received and filed October 30, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.